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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 48

THE UNITED STATES, PETITIONER

vs.

MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 8, 1937
CERTIORARI GRANTED OCTOBER 11, 1937

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 967

THE UNITED STATES, PETITIONER

vs.

MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In Court of Claims of the United States

No. 43,181

MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed December 12, 1935

To the Honorable Judges of the Court of Claims of the United States:

The Plaintiff, Mabel S. Andrews, Executrix, respectfully represents:

I

That she is the duly appointed executrix of the estate of Matthew Andrews, deceased; that such appointment was duly made and approved by the Probate Court of Cuyahoga County, Ohio; that such court is duly authorized under the laws of Ohio to administer estates; that such appointment is in full force and effect and said decedent, Matthew Andrews, and this plaintiff as executrix was and is a resident of Gates Mills, Ohio.

2 II

That this is a suit against the United States for the recovery of an overpayment of Federal income taxes for the calendar year 1930 in the amount of $5,552.98.

III

That under the provisions of the Act of Congress, approved May 29, 1928, entitled "Revenue Act of 1928" (Chap. 852, 45 Stat. 795) plaintiff as such executrix prepared and duly filed on or about March 15, 1931, with the Collector of Internal Revenue at Cleveland, Ohio, a return of the income of the estate of Matthew Andrews, deceased, for the calendar year 1930, on Form 1040 furnished by the Commissioner of Internal Revenue, such return disclosed a gross income of $121,949.89 of which $110,891.50 represented alleged dividends from domestic corporations and net income of $105,701.48 on which was computed a total tax of $12,800.30, which said tax was duly assessed and paid in quarterly installments as follows:

March 15, 1931	$3,200.30
June 15, 1931	$3,200.00
September 15, 1931	$3,200.00
December 15, 1931	$3,200.00

Of the above taxes so paid, $420.00 was refunded in September 1932.

IV

Thereafter, the Internal Revenue Agent in Charge at Cleveland, Ohio, informed plaintiff by letter dated December 14, 1931, that his office was recommending to the Commissioner of Internal Revenue that the return filed by plaintiff for the year 1930 be accepted as correct and further stated therein that his action was subject to approval in Washington and also should subsequent information be received which would materially change the amount reported, the Bureau would be obliged to redetermine the tax liability.

V

That as a result of a change in the capital structure of The M. A. Hanna Company, a corporation in which plaintiff owned stock in the year 1930, each shareholder of the original Seven Percent Cumulative First Preferred Stock Series "A" of said company was given the privilege of exchanging their original stock on the basis of one share for 1.27 shares of a new $7 Cumulative Preferred Stock. Plaintiff exercised her privilege of exchanging her fifteen hundred original shares and thereafter, together with other shareholders who had exercised their privilege, accepted an offer of certain underwriters to purchase each of their fractional .27 shares for $24.50 in cash. Plaintiff by acceptance of such offer received $36,750.00 in cash which was erroneously reported in the said estate tax return as dividends received in the year 1930 from The M. A. Hanna Company.

VI

Thereafter, the issue having been raised by the Internal Revenue Agent in Charge at Cleveland, Ohio, and in order to establish a uniform basis of treatment for their shareholders in connection with the transaction related in paragraph V, above, representatives of The M. A. Hanna Company conferred with the Bureau of Internal Revenue, the result of which was set forth in a letter from the Commissioner to the Internal Revenue Agent in Charge, Cleveland, Ohio, dated October 6, 1932 (symbols IT: ERR: CNW), to the effect that the amounts of cash received by the shareholders of The M. A. Hanna Company in 1930, as more fully described in paragraph V, above, represented proceeds from the sale of the fractional shares of new stock to underwriters and that the tax base would be the carryover base of the original issue of stock and accordingly would require a determination of gain or loss from such sale. Neither plaintiff nor The M. A. Hanna Company was notified of the aforesaid ruling in said letter until August 22, 1934.

VII

That applying the ruling of the Commissioner described in the preceding paragraph VI, the tax base of each of the fractional .27

shares of new stock sold was 27/127 of the base of the original stock which in the case of plaintiff was $92 per share assigned in the final determination of the estate tax of the estate of Matthew Andrews, deceased. On this basis the fractional shares of stock sold by plaintiff had an aggregate base of (27/127 X 1,500 X $92) or $29,338.58, for which $36,750.00 was received, resulting in a taxable profit of $7,411.42 instead of a dividend of $36,750.00, and effecting a reduction in the tax liability of $5,552.98 for the year 1930.

VIII

Thereafter, on February 1, 1933, the plaintiff filed a claim for refund for the year 1930 on Form 843 furnished by the Commissioner for $995.52 with the Collector of Internal Revenue at Cleveland, Ohio, setting forth therein as the bases of such claim the right to deduct certain alleged losses for the year 1930 which were sustained by plaintiff's investment in shares of stock in American Cuptor Corporation and Bertha Consumers Company.

5

IX

Thereafter, on June 28, 1934, and prior to any action by the Commissioner of Internal Revenue on claim for refund filed February 1, 1933, plaintiff filed an amended claim for $6,454.09 and supplement to said claim of February 1, 1933, setting forth therein as a basis therefor that the amount received, namely, $36,750.00, as set forth in paragraph V, above, was erroneously reported as a dividend in plaintiff's income tax return for the year 1930 and erroneously so considered by the Internal Revenue Agent in Charge at Cleveland, Ohio; that of said amount $29,338.58 represented a return of a proportion of the original investment applicable to the shares of new stock sold and that the balance $7,411.42 represented profit applicable to such shares of new stock sold.

X

That the Commissioner by letter dated November 2, 1935 (symbol IT:AR:C–1–PI), proposed to reject the amended claim filed June 28, 1934, although conceding that an overpayment had been made, for the reason that said original claim of February 1, 1933, and amendment thereto were filed subsequent to May 1, 1929, the effective date of Treasury Decision 4265. Thereafter, the Commissioner by letter dated November 25, 1935 (symbols IT:C:CC:4–LBB) notified plaintiff that a refund in the amount of $160.00 would be allowed on said original claim of February 1, 1933.

XI

That the claim for refund filed February 1, 1933, as amended June 28, 1934, is sufficient compliance with Section 322 of the Revenue Act of 1928 or corresponding section of subsequent Revenue Acts;

6 that plaintiff is entitled to recover any taxes that have been overpaid by the erroneous inclusion as a dividend, the amount of $36,750.00 instead of reporting $7,411.42 which represents profits from the sale of said stock and that this suit is timely filed under the provisions of the "Revenue Act of 1932" (Chap. 209, 47 Stat. 169), Section 3226 Revised Statutes, as amended and further amended by Section 1103, Revenue Act of 1932.

XII

That the action of the Commissioner in refusing to refund the admitted overpayment as aforesaid and rejecting plaintiff's claim as aforesaid was erroneous, wrongful and illegal and that by refusing to refund such admitted overpayment the Commissioner will ultimately subject the plaintiff to a further tax on such $29,338.58 in that the tax base of the shares of stock now held will, in accordance with the ruling of the Commissioner set forth in paragraph VI, above, be correspondingly reduced upon sale or other disposition of such stock.

XIII

That plaintiff as executrix of the estate of Matthew Andrews, deceased, is the owner of the claim described in this petition; that there has been no assignment or transfer of said claim, or any part thereof, or of any interest therein; that the plaintiff is justly entitled to the amount herein claimed, after allowing all just credits and set-offs; that neither the plaintiff nor said Matthew Andrews, deceased, has in any way voluntarily aided or abetted or given encouragement to rebellion against the United States, and plaintiff believes the facts stated in this petition to be true.

7 Wherefore, the premises considered, the plaintiff prays judgment against the United States in the full sum of $5,552.98, together with interest thereon as provided by law, and for such further relief as the Honorable Court may find plaintiff entitled to receive.

FRED R. SEIBERT,
Attorney for Plaintiff,
352 Leader Building, Cleveland, Ohio.

[*Duly sworn to by Mabel S. Andrews; jurat omitted in printing.*]

8 *Appendix to petition*

In the Probate Court. 179232

THE STATE OF OHIO, CUYAHOGA COUNTY, *ss:*

I, Nelson J. Brewer, Judge of the Probate Court, within and for said County, in the State aforesaid, do hereby certify and make known, that on the 21st day of January, one thousand nine hundred and twenty-nine, letters Testamentary, on the estate of Matthew

Andrews, deceased, were granted unto Mabel S. Andrews and Donald S. Andrews, and the same are now in full force and effect, as to Mabel S. Andrews; said Donald S. Andrews having died.

In testimony whereof, I have set my hand and affixed the seal of said Probate Court, at Cleveland, in said County, this 4th day of December 1935.

(Signed) NELSON J. BREWER,
Probate Judge.

By (signed) H. BECKMAN,
Deputy Clerk.

PC 41. 3M. 2295–34.

9 II. *General traverse*

(Filed January 21, 1936)

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

FRANK J. WIDEMAN,
Assistant Attorney General.

III. *Argument and submission of case*

On December 9, 1936, this case was argued and submitted on merits by Mr. Fred R. Seibert, for plaintiff, and by Mr. George W. Billings, for defendant.

10 IV. *Special findings of fact, conclusion of law, and opinion of the court by Whaley, J.*

Filed February 8, 1937

Mr. Fred R. Seibert for the plaintiff.

Mr. George W. Billings, with whom was Mr. Assistant Attorney General Robert H. Jackson, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence adduced makes the following

Special findings of fact

1. Plaintiff is a citizen of the United States, residing at Gates Mills, Ohio, and is the duly appointed executrix of the estate of Matthew Andrews, deceased.

2. On or about March 15, 1931, plaintiff as such executrix duly filed an individual income tax return for the calendar year 1930, for the income of the estate of Matthew Andrews, deceased. The return disclosed a total tax due of $12,800.30, which was duly paid in quarterly installments, as follows:

March 15, 1931	$3,200.30
June 15, 1931	3,200.00
September 15, 1931	3,200.00
December 15, 1931	3,200.00

The gross income shown on the return included the amount of $110,891.50, representing dividends from domestic corporations. Of this amount, $36,750.00 was reported in the return as dividends received in the year 1930 from the M. A. Hanna Company.

11 3. The amount of $36,750.00, reported as dividends received from the M. A. Hanna Company, was derived from the following transaction: Plaintiff, prior to the year 1930, owned 1,500 shares of the original Seven Percent Cumulative First Preferred Stock Series "A" of The M. A. Hanna Company. As a result of a recapitalization of this company in November and December 1929, plaintiff was given the privilege of exchanging the aforesaid original stock on the basis of one share of the original stock for 1.27 shares of a new issue of $7.00 Cumulative Preferred Stock, the plan including an understanding that the fractional .27 share of the new stock could be disposed of to the underwriting firm handling the transaction, for $24.50 in cash for each fractional .27 share of the new stock. Plaintiff exercised the privilege so obtained and received thereby $36,750.00 in cash, in addition to 1,500 shares of the new stock, which amount in cash, as above stated, was reported in the income tax return as dividends received from The M. A. Hanna Company.

4. In December 1931, plaintiff was advised by the Internal Revenue Agent in Charge that the return as filed, reporting the sum of $36,750.00 as dividends was considered as correct, with the added proviso that such finding was subject to the approval of the Bureau of Internal Revenue in Washington, D. C., and that should subsequent information be received which would materially change the amount of tax reported, it would be necessary, under existing laws, to redetermine the tax liability.

5. On June 15, 1932, plaintiff filed with the Collector of Internal Revenue claims for refund in the amount of $420.00, on the ground that the profit resulting from the sale of 700 shares of the common stock of the Hanna Company had been incorrectly computed. This claim for $420.00 was allowed in full, Certificate of Overassessment issued by the Commissioner of Internal Revenue September 24, 1932, and the amount sought in this claim paid with interest.

6. In a letter dated October 6, 1932, following conferences with representatives of The M. A. Hanna Company, the Commissioner of Internal Revenue advised the Internal Revenue Agent in

12 Charge, at Cleveland, Ohio, that the amounts of cash received by plaintiff and other shareholders of the Hanna Company, as above stated, represented proceeds from the sale of the fractional shares of new stock, and that gain or loss from such sale should be determined upon the basis of the original stock in the hands of the plaintiff and the other shareholders.

7. On or about February 2, 1933, plaintiff filed a claim for refund in the amount of $995.52. The grounds upon which refund was sought in this claim were stated in the claim as follows:

"First: Because a loss of $4,250.00 occurred in year 1930 on 320 shares of the common stock and 10 shares of the preferred stock of American Cuptor Corporation on which a valuation for purposes of the Federal estate tax was established as of January 5, 1929, in the amount of $4,250.00. American Cuptor Corporation became insolvent, and this stock became worthless in the year 1930.

"Second: Loss is claimed on 160 shares of the preferred stock of Bertha-Consumers Company on which the value for Federal estate tax purposes was established as of January 5, 1929, at $800.00. Bertha-Consumers Company became insolvent, and this stock became worthless in 1930.

"Copy of letter dated March 8, 1932, from the receivers of Bertha-Consumers Company to Mr. D. B. Heiner, collector of internal revenue, Pittsburgh, Pa., is attached hereto. Deponent reserves the right to file such additional information and evidence as may be needed to fully establish these claims in case the foregoing is not sufficient."

Consideration and action upon this claim was delayed awaiting the outcome of litigation relating to the question of worthlessness, in 1930, of the stock of the American Cuptor Corporation. Subsequently, in 1936, this claim was rejected in part and allowed in the amount of $160.00, which amount was covered by Certificate of Overassessment, on which refund was duly made to plaintiff.

8. On June 29, 1934, plaintiff filed claim for refund in the amount of $6,454.09. On the claim form itself appeared the following statement:

"This claim is filed as an amendment and amplification of claim for refund filed February 1, 1933. The right to amend claims
13 for refund prior to rejection has been upheld by the Supreme Court in the cases of Memphis Cotton Oil Co. (288 U. S. 62), Factors and Finance Co. (288 U. S. 89), Bemis Brothers Bag Co. (28 U. S. 28), George Moore Ice Cream Co. (289 U. S. 373), and in the case of Youngstown Sheet & Tube Co., decided by the Court of Claims, June 4, 1934.

"The basis of this claim is set forth in the attached statement."

The statement attached to the claim setting forth the basis thereof was as follows:

"This taxpayer erroneously included as a taxable dividend an amount of $36,750.00, received from The M. A. Hanna Company during the year 1930. This amount represents proceeds from sale of new preferred stock issued by The M. A. Hanna Company upon the reorganization of that company in 1930. On the basis of the value of $92 per share assigned on the estate tax return to the stock exchanged for the new issue in 1930, the basis of the stock sold amounted

to $29,338.50. The transaction, therefore, resulted in a profit of $7,411.50 instead of a dividend of $36,750.00.

"Giving effect to the above, together with the adjustments claimed in claim for refund filed February 1, 1933, results in a tax liability of $5,926.21 instead of $12,380.30, or an overpayment of $6,454.09, refund of which is herewith requested.

"Complete information with respect to the transaction here involved, and which can be furnished in the instant case if necessary, has been filed with and considered by the Bureau during the year 1932, at which time it was determined that the amounts received by stockholders in connection with the transaction did not constitute a taxable dividend.

"The right to furnish additional information in substantiation of this claim is respectfully reserved.

"A certified copy of letter from the probate court showing the appointment of the undersigned as executrix of the estate of Matthew Andrews, and that the appointment remains in full force and effect is attached."

The plaintiff was advised by the Commissioner, in a letter dated November 2, 1935, that while "the merits of the claim are allowable", it would be disallowed in full for the reason that "the facts in the case disclose that the claim filed in June 1934 was wholly unrelated to the claim filed on February 2, 1933, there being an independent demand based upon an entirely different issue. Therefore,

it is held that the claim was not filed within the limitations
14 prescribed by law and cannot be allowed." December 16, 1935, the Commissioner of Internal Revenue mailed to the plaintiff an official notice of rejection in full of this claim. The petition in this suit was filed December 12, 1935. The basis of this claim in so far as the merits thereof are concerned, was as follows: Plaintiff had reported the cash received from the sale of the fractional shares of new stock in the Hanna Company as a dividend. The Commissioner of Internal Revenue had ruled the transaction should be treated as a sale of the fractional shares of new stock. The value of the original stock in the hands of the plaintiff to be used as a basis in computing gain or loss on the sale had been determined to be $92.00 per share in the final determination of the estate tax on the estate of Matthew Andrews, deceased. On this basis the fractional shares of stock sold by plaintiff had, in the plaintiff's hands, a value of $29,338.56. The sale price was $36,750.00, resulting in a taxable profit of $7,411.44 instead of a dividend of $36,750.00, and effecting a reduction in plaintiff's tax liability for the year 1930 of $5,536.97.

Conclusion of law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is entitled to recover $5,536.97, with interest.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of five thousand five hundred thirty-six dollars and ninety-seven cents ($5,536.97), together with interest as provided by law.

Opinion

WHALEY, Judge, delivered the opinion of the court:

This is a suit to recover an admitted overpayment of income tax for 1930 wherein the Government defends on the ground that such payment can not be made for the reason that a timely claim for refund cannot be amended, after the period for filing a claim has expired, which sets up a new ground for recovery.

Plaintiff duly filed her return for 1930 and paid the tax of $12,800.30 shown due thereon in quarterly installments, the last installment being paid on December 15, 1931. During 1930 plaintiff, pursuant to a recapitalization arrangement, exchanged stock in a corporation in which she was a stockholder for new stock in the same corporation and at the same time exercised the privilege granted of disposing of fractional shares of new stock for $36,750 in cash. Plaintiff included the entire amount of cash so received in her return for 1930 as a dividend and paid her tax on that basis.

In December 1931 the revenue agent in charge for plaintiff's district advised plaintiff that her return as filed appeared to be correct but that such conclusion was subject to approval by the Commissioner and that in the event subsequent information be received which would materially change her tax it would be necessary to redetermine her tax liability.

In October 1932 following a conference with representatives of the corporation from which the so-called dividend had been received, the Commissioner advised the revenue agent in charge, who had previously indicated his approval of plaintiff's return as filed, that the cash received by its stockholders (including plaintiff) in the recapitalization transaction, heretofore referred to, represented proceeds from the sale of fractional shares of stock and that gains or losses should be computed on such sales instead of having the entire cash reported as dividends, as returned by plaintiff in her return. The result of this change in the treatment of the cash received, in so far as plaintiff was concerned, was that a taxable profit was shown of $7,411.44 instead of a taxable dividend of $36,750, and a reduction in her tax liability for 1930 of $5,536.97.

Subsequent thereto, namely, February 2, 1933, which was within the two-year period for filing claims on account of the tax paid in 1931 for 1930, plaintiff filed a claim for refund of $995.52 for 1930 and assigned as grounds therefor that certain losses (unrelated to the dividend item referred to above) had been sustained in that year for which deductions had not been claimed in her return.

After the statute had run on filing a new claim for refund, plaintiff on June 29, 1934, filed a claim for refund of $6,454.09 for 1930 and assigned as a basis therefor not only the grounds set out in the claim of February 2, 1933, but also the additional ground that refund should be allowed on account of the change in the treatment of the cash received in the recapitalization transaction heretofore
16 referred to, that is, such cash should not be taxed as a dividend but should be taxed only as profit to the extent that profit was shown from a sale of fractional shares of stock in the manner therefore determined by the Commissioner. The new claim was styled as an amendment and amplification of the claim filed February 2, 1933, which was still pending before the Commissioner. November 2, 1935, which was likewise before the claim of February 2, 1933, had been acted upon, the Commissioner advised plaintiff that while "the merits of the claim [that filed June 29, 1934] are allowable", it can not be allowed for the reason that the position of the Bureau was that the claim of February 2, 1933, based on certain grounds could not be amended, after the statute had run on filing new claims, to include items unrelated to those shown in the original claim. The new claim was finally rejected December 16, 1935, and this suit was instituted shortly prior thereto, December 12, 1935. The original claim was not finally acted upon until some time in 1936, when it was allowed in part and rejected in part, but no allowance has been made on account of the new item set up in the claim of June 29, 1934.

Our sole question is whether under the circumstances of this case the timely claim for refund, based upon certain grounds, was properly amended after the statute had run on filing a new claim, but prior to action on the original claim, so as to permit recovery on an item not included in the original claim. We are convinced that this case comes within the principle laid down in United States v. Memphis Cotton Oil Co., 288 U. S. 62; United States v. Factor and Finance, 288 U. S. 89, and Bemis Brothers Bag Company v. United States, 289 U. S. 28, wherein amendment of a claim was permitted under certain circumstances and that it is not essentially different from that presented in Youngstown Sheet & Tube Co. v. United States, 79 C. Cls. 683, certiorari denied, 293 U. S. 599, where the right to amend a refund claim was fully discussed and the cases distinguished. We adhere to the opinion therein expressed. See also Con P. Curran Printing Co. v. United States, No. J–657, decided by this court on June 1, 1936.

In this instance, not only was a timely claim for refund filed
17 on account of certain items, but also prior to the expiration of the time within which a new and independent claim could have been filed, the Commissioner had determined that adjustment should be made of the item which produced the overpayment now in controversy. After the statutory period for filing a new claim had expired, but prior to action on the original claim, plaintiff filed the

amendment to the original claim which did nothing more than advise the Commissioner that she was not only demanding the amount shown in the original claim but also that which the Commissioner had long prior thereto and within the statutory period recognized as payable to her. There was therefore no lack of notice within the statutory period that plaintiff was demanding refund on account of the items set out in the original claim and that refund was due plaintiff on account of the item later set up in the amended claim. Action on the claim required a redetermination of plaintiff's entire tax liability, which included a consideration of all items affecting such tax liability in order to determine whether there had been an overpayment of tax. Cf. Lewis v. Reynolds, 284 U. S. 281. When the Commissioner came to take final action on the original claim he had before him his own determination, made within the statutory period, that there had been an overpayment on the item here in controversy and an amendment to the claim showing a demand for such overpayment. All the equities are with the plaintiff. It would be immoral and unconscionable not to allow an amendment under these circumstances, and especially where an admitted overpayment of taxes is clearly shown and the Commissioner had knowledge of the overpayment prior to the expiration of the statutory period.

Judgment will accordingly be entered for plaintiff for $5,536.97 with interest as provided by law. It is so ordered.

WILLIAMS, Judge; LITTLETON, Judge; GREEN, Judge; and BOOTH, Chief Justice, concur.

18 V. *Judgment*

At a Court of Claims held in the City of Washington on the 8th day of February, A. D. 1937, judgment was ordered to be entered, as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of five thousand five hundred thirty-six dollars and ninety-seven cents ($5,536.97), together with interest as provided by law.

19 [Clerk's certificate to foregoing transcript omitted in printing.]

(Endorsement on cover:) File No. 41,507. Court of Claims. Term No. 967. The United States, Petitioner, vs. Mabel S. Andrews, Executrix of the Estate of Matthew Andrews, Deceased. Petition for a writ of certiorari and exhibit thereto. Filed May 8, 1937. Term No. 967 O. T. 1936.

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Order allowing certiorari

Filed October 11, 1937

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice BLACK took no part in the consideration and decision of this application.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 967

THE UNITED STATES, PETITIONER

v.

MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Claims is reported in 17 F. Supp. 980.

JURISDICTION

The judgment of the Court of Claims was entered on February 8, 1937. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Respondent filed a timely claim for refund of Federal income tax on certain specific grounds stated therein. Subsequently, after the statutory period of limitation had expired, respondent filed another claim for refund on an entirely different and new ground, which purported to amend the claim which had been timely filed. The question presented is whether recovery may be permitted on the new claim as an amendment to the original claim.

STATUTES INVOLVED

The applicable portions of the pertinent statutes will be found in the Appendix, *infra,* pp. 18–20.

STATEMENT

The special findings of fact of the Court of Claims may be summarized as follows:

Respondent, a citizen of the United States, and the duly appointed executrix of the estate of Matthew Andrews, deceased, filed, on or about March 15, 1931, an individual income tax return for the calendar year 1930, for the estate of Matthew Andrews, showing a tax due of $12,800.30, which amount was duly paid in 1931. The gross income shown on the return included an amount of $110,891.50, representing dividends from domestic corporations. Of this amount, $36,750 was reported as dividends received in the year 1930 from The M. A. Hanna Company. (Fdgs. 1, 2.)

The amount of $36,750, reported as dividends from The Hanna Company, was derived as a result of a recapitalization of this company in 1929, in which respondent, owner of 1,500 shares of preferred stock of The Hanna Company prior to 1930, was given the opportunity to exchange this stock on the basis of one share of the original stock for 1.27 shares of a new issue, with the further understanding that the fractional .27 shares of the new stock could be disposed of to the underwriting firm handling the transaction for $24.50 in cash for each fractional .27 shares of new stock. Respondent exercised this privilege and received $36,750 in cash (in addition to 1,500 shares of the new stock), which amount was returned as a dividend received from The Hanna Company. (Fdg. 3.)

In December 1931, respondent was advised by the Internal Revenue Agent in Charge in her district, that the return reporting the amount of $36,750 as a dividend was considered as correct, but that such finding was subject to the approval of the Bureau of Internal Revenue in Washington, D. C., and should subsequent information be received which would materially change the amount of tax, it would be necessary, under existing laws, to redetermine the tax liability. (Fdg. 4.)

On June 15, 1932, respondent filed a claim for refund in the amount of $420, on the ground that the profit resulting from the sale of 700 shares of common stock (not the preferred stock above re-

ferred to), of The Hanna Company, had been incorrectly computed. This claim was allowed in full September 24, 1932, and was paid with interest. (Fdg. 5.)

In a letter dated October 6, 1932, following conferences with representatives of The Hanna Company, the Commissioner of Internal Revenue advised the Internal Revenue Agent in charge at Cleveland, Ohio, that the amounts of cash received by respondent and other stockholders of The Hanna Company, as above stated, represented proceeds from the sale of the fractional shares of new stock, and that gain or loss from such sale should be determined upon the basis of the original stock in the hands of the stockholders. (Fdg. 6.)

On or about February 2, 1933, respondent filed claim for refund in the amount of $995.52, upon the ground of certain losses incurred in 1930, because of worthlessness of certain capital stock in corporations other than The Hanna Company. Consideration and action upon this claim were delayed awaiting the outcome of other litigation on the question of worthlessness of the stock of one of the corporations referred to in this claim. Subsequently, in 1936, this claim was rejected in part and allowed in the amount of $160, which was duly refunded to respondent. (Fdg. 7.)

On June 29, 1934, respondent filed a claim for refund in the amount of $6,454.09. On the claim form itself there appeared the following statement:

This claim is filed as an amendment and amplification of claim for refund filed February 1, 1933. The right to amend claims for refund prior to rejection has been upheld by the Supreme Court in the cases of *Memphis Cotton Oil Co.* (288 U. S. 62), *Factors and Finance Co.* (288 U. S. 89), *Bemis Brothers Bag Co.* (289 U. S. 28), *George Moore Ice Cream Co.* (289 U. S. 373), and in the case of *Youngstown Sheet & Tube Co.*, decided by the Court of Claims June 4, 1934.

The basis of this claim is set forth in the attached statement.

The statement attached to the claim setting forth the basis thereof was as follows:

This taxpayer erroneously included as a taxable dividend an amount of $36,750.00 received from The M. A. Hanna Company during the year 1930. This amount represents proceeds from sale of new preferred stock issued by The M. A. Hanna Company upon the reorganization of that company in 1930. On the basis of the value of $92 per share assigned on the Estate tax return to the stock exchanged for the new issue in 1930, the basis of the stock sold amounted to $29,338.50. The transaction, therefore, resulted in a profit of $7,411.50 instead of a dividend of $36,750.00.

Giving effect to the above, together with the adjustments claimed in claim for refund filed February 1, 1933, results in a tax liability of $5,926.21 instead of $12,380.30, or

an overpayment of $6,454.09, refund of which is herewith requested.

Complete information with respect to the transaction here involved, and which can be furnished in the instant case if necessary, has been filed with and considered by the Bureau during the year 1932, at which time it was determined that the amounts received by stockholders in connection with the transaction did not constitute a taxable dividend.

The right to furnish additional information in substantiation of this claim is respectfully reserved.

A certified copy of letter from the Probate Court showing the appointment of the undersigned as Executrix of the Estate of Matthew Andrews, and that the appointment remains in full force and effect is attached.

In a letter dated November 2, 1935, respondent was advised by the Commissioner of Internal Revenue that while "the merits of the claim are allowable", it would be disallowed in full for the reason that "the facts in the case disclose that the claim filed in June 1934 was wholly unrelated to the claim filed on February 2, 1933, there being an independent demand based upon an entirely different issue. Therefore, it is held that the claim was not filed within the limitations prescribed by law and cannot be allowed." On December 16, 1935, official notice of rejection in full of this claim was mailed to respondent. This suit in the Court of Claims was filed December 12, 1935. (Fdg. 8.)

On February 8, 1937, judgment was entered by the Court of Claims for the respondent in the amount of $5,536.97.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that, under the facts and circumstances in this case, respondent was entitled to refund on the claim filed after the period of limitation had expired, but purporting to be an amendment to a prior claim timely filed.

2. In failing to hold that, under the facts and circumstances in this case, refund on the claim filed, after the period of limitation had expired, was barred by the statute of limitations, and the claim so filed could not be considered as an amendment to the timely claim, as it stated a new and different ground for refund or cause of action.

3. In failing to enter judgment for the United States and dismiss the petition.

REASONS FOR GRANTING THE WRIT

1. In holding that a claim for refund seeking the repayment of taxes in a specific amount on particularized grounds may be amended, after the statute had run on the filing of a new claim, to permit recovery of an additional sum on a ground entirely unrelated to those asserted in the original claim, the court below has rendered a decision which conflicts with the decisions of the Circuit

Court of Appeals for the Sixth Circuit in *United States* v. *Richards*, 79 F. (2d) 797, certiorari denied, 297 U. S. 718, and *Bryant Paper Co.* v. *Holden*, 63 F. (2d) 370, certiorari denied, 290 U. S. 631, and the holding of the Second Circuit on this question in *New York Trust Co.* v. *United States*, 87 F. (2d) 889.[1] The decision below also conflicts in principle with the decision of this Court in *United States* v. *Henry Prentiss & Co.*, 289 U. S. 73.

The holding of the court below that the present case comes within the principle laid down in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factors and Finance Co.*, 288 U. S. 89; and *Bemis Brothers Bag Company* v. *United States*, 289 U. S. 28, constitutes a misconstruction and misapplication of those cases. It is

[1] Petition for a writ of certiorari filed by the taxpayer in *New York Trust Company, Executor* v. *United States*, No. 921, is now pending. That case was decided by the Circuit Court of Appeals on alternative grounds. The first ground presents the question of amendment of specific claims for refund, and the second ground the question whether the original claim in that case had been finally acted upon prior to the filing of the alleged amendment. In view of the importance of the first question, and the probable conflict of decisions, the Government does not oppose a review of this question in the *New York Trust Company* case if it be deemed essential to the decision reached therein. However, we believe that notwithstanding the outcome of the first question, the judgment of the Circuit Court of Appeals in that case must, in any event, ultimately be sustained upon the second ground. A memorandum pointing out our reasons for this conclusion will be filed in that case.

to be noted that the decisions of the Circuit Courts of Appeals above referred to were rendered after the above decisions of this Court.

2. The question presented by the instant case is one of importance in the administration of the Federal revenue laws and is of interest to taxpayers generally. Since March 27, 1929, the regulations of the Treasury Department, applicable to claims for refund filed on or after May 1, 1929 (the original claim in the present case was filed February 2, 1933, and the amended claim June 29, 1934), have consistently provided that claims for refund must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof; that any claim which does not comply with these requirements will not be considered for any purpose as a claim for refund or credit; and that no refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor *except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period.*[2] The decisions of this Court above referred to involved claims for refund filed prior to May 1, 1929, under earlier and differ-

[2] Treasury Decision 4265, Cumulative Bulletin VIII–1, p. 110; Art. 1254, Regulations 77, Revenue Act of 1932; Art. 322–3, Regulations 86, Revenue Act of 1934; Art. 322–3, Regulations 94, Revenue Act of 1936.

ent regulations.[3]. The regulations applicable to the present case have the force of law, and preclude the recovery sought in the present case. Many claims for refund filed out of time but purporting to amend timely claims have been rejected under these regulations, and the taxpayers are continuing to litigate their right to amendment. As the question arises frequently, we feel that this Court should settle the doubts which may exist as to the validity of the existing regulations. Even under this Court's decisions, however, and without regard to the regulations applicable here and which were not involved in those cases, we believe there was no right of amendment.

3. The original claim for refund in the present case, filed February 2, 1933, claimed an overpayment of $995.52 on account of taxes for the year 1930 and specified as the grounds for the refund of this amount that the taxpayer had suffered deductible losses during 1930 by reason of certain stocks of the American Cuptor Corporation and the Bertha-Consumers Company becoming worthless. Action on this claim was delayed awaiting the outcome of litigation relating to the question of worthlessness in 1930 of the stock of the American Cuptor Corporation. The amended claim for refund was filed June 29, 1934, after the statutory period for filing claims for refund had expired.

[3] See Mim. 4092 of October 30, 1933, Cumulative Bulletin XII–2, pages 96, 97.

This amended claim asked for a refund of $6,454.09. The ground upon which the increased amount was sought was stated in the amended claim to be that the taxpayer had "erroneously included as a taxable dividend an amount of $36,750.00, received from the M. A. Hanna Company during the year 1930. This amount represents proceeds from sale of new preferred stock issued by the M. A. Hanna Company upon the reorganization of that company in 1930."

An examination of the original timely claim for refund thus shows very clearly that it did not charge overpayment generally. It asked for a refund of a stated sum of money and specified particular facts and reasons why that sum of money should be refunded. The case, therefore, is not one where the claimant has left the grounds of challenge open and where the Bureau has itself to blame for not insisting at the outset upon a full disclosure of the grievance. The grievance was stated, and stated specifically, and the Commissioner was under a duty to consider it. The territory which the claim called upon the Commissioner to explore was narrow. It covered only the activities and affairs of two corporations—the American Cuptor Corporation and the Bertha-Consumers Company.

In June 1934, the taxpayer became aware, perhaps for the first time, that it had an additional claim against the Government on account of taxes

for 1930. It was then too late to file a new claim for refund, and so the taxpayer sought to assert the new claim by way of amendment to the old claim. The old claim had asked for the repayment of $995.52; the new claim asked $6,454.09. The old claim had asserted that the sum of $995.52 should be returned because the stocks of two named corporations had become worthless. The new claim set up an entirely different and unrelated state of facts for the recovery of the additional sum. Even the theories of recovery were different. The old claim sought additional deductions from gross income. The new claim sought a different treatment of an item of gross income, that is, that an amount which was reported as dividends from a corporation (which had no connection with the corporation whose stock was claimed to be worthless) should have been treated as proceeds of sale of stock of that corporation. It is apparent that the paths of investigation to be followed in considering the original claim would at no time cross the paths to be followed under the new claim. No discovery would be made in the investigation of the old claim which would have any bearing on the new. The new claim was not simply an adaptation of the relief to a case already proved under the original claim. It sought additional relief on a wholly different grievance.

If, as this Court and the lower Federal courts have held, in determining what is a permissible amendment of a claim for refund, weight must be

given to analogies of pleading in a lawsuit, the conclusion must follow in the present case that the claim of June, 1934, did not constitute merely a perfection of a defectively stated cause of action or the adaptation of a prayer for relief to facts adequately alleged, but was the introduction of an entirely new cause.[4] Admittedly, a new cause was barred at the time the attempt at amendment was made.

4. In reaching its conclusion, the court below apparently gave much weight to the statement made in its opinion that the Commissioner had, prior to the running of the statutory period for filing claims for refund, recognized that the additional amount, which the taxpayer in the amended claim requested should be refunded to her, constituted an overpayment and was properly payable to her.

Even if the Commissioner did know, prior to the running of the statute, that the taxpayer had overpaid her tax that fact would not make inapplicable the statutory requirement that a claim for refund be filed, and a claim for refund which sets up grounds entirely new and unrelated to those specifically urged in a prior claim may not be considered an amendment of the earlier claim but constitutes a wholly new claim. In *Swedish Iron & Steel Corporation* v. *Edwards,* 1 F. Supp. 335, 337 (S. D. N. Y.) (affirmed *per curiam,* 69 F. (2d) 1018), the District Court said:

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[4] Cf. *United States* v. *Seminole Nation*, 299 U. S. 417; *B. & O. S. W. R. Co.* v. *Carroll*, 280 U. S. 491.

> Here the letters treated as an amendment set up an entirely new ground not in any way mentioned in the original claim. Strictly it was not an amendment at all, but the presentation of an entirely new basis for relief. To allow an entirely new ground for relief to be presented after the statutory period has run appears to me no different than to allow the original and only claim for refund to be filed at that time. Clearly the latter is forbidden by the statute. In my opinion, the former is also.

In *United States* v. *Richards,* 79 F. (2d) 797 (C. C. A. 6th), *supra,* the taxpayer had in his original tax return claimed a deduction for the very item which he set up in his amended claim for refund, and the Commissioner had disallowed it. Notwithstanding the fact that the taxpayer in that case had at one time asserted the right to the deduction in question and the Commissioner had considered the matter and denied the deduction, the Circuit Court of Appeals held that the renewal of the asserted right by the taxpayer in a claim for refund filed after the expiration of the statutory period could not be considered an amendment of an earlier claim for refund based upon other grounds. The court there said, page 801:

> It is no answer to say that the facts were already before the Commissioner by virtue of the deduction claimed in the original return and its disallowance.

There would seem to be less basis in the present case for contending that the grounds set forth in the amended claim constituted an amendment of the earlier claim than there was in the *Richards* case, *supra,* for the grounds relied on here in the amended claim were asserted by the taxpayer for the first time in that claim.

It may also be noted that the court below has not found as a fact that the Commissioner knew, prior to the running of the statute, that the taxpayer had overpaid her tax on the item relied on in the amended claim. It is true that the findings state that the underlying facts relating to the reorganization of the Hanna Company, treatment of whose stock formed the issue in the amended claim, were before the Commissioner before the expiration of the statutory period, but these facts were not before the Commissioner by virtue of anything the taxpayer here had said or done, and there is nothing in the present case to indicate that the Commissioner knew, prior to the running of the statute, that the taxpayer's tax liability for 1930 would be affected by his decision as to the treatment generally of the proceeds of the Hanna stock upon the reorganization. Whether or not, as far as the taxpayer was concerned, a treatment of the item different from that made by the taxpayer herself would result in a diminished tax liability depended upon other factors, such as the taxpayer's basis for computing gain or loss and the rate of tax to be

applied. There is no showing that the Commissioner knew how the taxpayer acquired the stock, or what the basis of the stock was. There is a showing in the findings, however, that representatives of the Hanna Company knew prior to October 6, 1932, that the matter of the treatment for tax purposes of the proceeds of its stock upon the reorganization was under investigation by the Commissioner, and the company, rather than the Commissioner, should have advised its stockholders to protect themselves by filing claims for refund. The statutory period in which the taxpayer could file claims for refund did not expire until the latter part of the following year, 1933. On February 2, 1933, the taxpayer did file the original claim involved here for other items, but it was not until June 1934 that the amended claim here in question was filed.

5. The court below, citing *Lewis* v. *Reynolds*, 284 U. S. 281, held that action on the timely claim for refund of February, 1933, which asked for the refund of $995.52 on the ground that the stocks of two corporations had become worthless, "required" a redetermination of plaintiff's entire tax liability, including a consideration of all items affecting such tax liability. We respectfully submit that neither *Lewis* v. *Reynolds, supra*, the revenue laws, nor administrative practice "requires" as a condition to action on a refund claim that the entire return of a taxpayer be audited. If the claim is rejected,

certainly such an audit is not called for by virtue of the refund claim. *Lewis* v. *Reynolds* merely holds that before taxes are refunded, a return *may be reaudited* to determine whether the taxpayer, although prevailing on the item asserted in the claim, has actually overpaid his taxes for the year in question. The amount refundable under the original claim in the present case was $160.00. At the time the amended claim for refund was filed, the time for assessment of additional taxes had expired. And yet, even though the Commissioner could not assess additional taxes, the court below holds that there was at that time a duty to reaudit in order to return to the taxpayer amounts which the taxpayer then for the first time claimed were overpaid. This holding, we submit, goes far toward nullifying the statutes requiring the filing of claims for refund and the regulations requiring claims to set forth in detail each ground upon which a refund is claimed.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Claims should be granted.

STANLEY REED,
Solicitor General.

MAY, 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 856, 861:

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General rule.*—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on allowance.*—

(1) *Period of Limitation.*—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 1103. LIMITATIONS ON SUITS BY TAXPAYERS.

(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of

any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

* * * * *

Treasury Decision 4265, Cumulative Bulletin VIII–1, page 110:

* * * * *

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal

Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 48

THE UNITED STATES, PETITIONER

v.

MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 9–11) is reported in 17 F. Supp. 980.

JURISDICTION

The judgment of the Court of Claims was entered February 8, 1937 (R. 11). The petition for a writ of certiorari was filed May 8, 1937 (R. 11), and was granted October 11, 1937. The jurisdiction of this Court is conferred by Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The respondent filed a timely claim for refund of Federal income tax on certain specific grounds. Subsequently, after the statutory period of limitation for filing refund claims had expired, the respondent filed a second claim for refund on an entirely different ground as "an amendment and amplification" of the timely claim. The sole question is whether recovery may be permitted on the second claim as an amendment of the first claim.

STATUTES AND TREASURY REGULATIONS INVOLVED

The applicable portions of the pertinent statutes and Treasury regulations will be found in the Appendix, *infra*, pp. 29–32.

STATEMENT

This suit was brought by the respondent to recover Federal income tax paid for the calendar year 1930. The case was submitted upon an agreed statement of facts. The special findings of fact of the Court of Claims may be summarized as follows:

The respondent, as executrix of the estate of Matthew Andrews, deceased, filed, on or about March 15, 1931, an individual income tax return for the calendar year 1930 for the estate showing a tax due of $12,800.30 which was paid in 1931 (R. 5). The gross income shown on the return included an amount of $110,891.50, representing dividends from domestic corporations. Of this amount

$36,750.00 was reported as dividends received in the year 1930 from The M. A. Hanna Company, hereinafter called the Hanna Company (R. 6).

The amount of $36,750.00 was derived as a result of a recapitalization of the Hanna Company in 1929 in which the respondent, owner of 1,500 shares of an issue of the preferred stock, exchanged this stock on the basis of one share for 1.27 shares of a new issue and received 1,500 new shares and the sum of $36,750.00 pursuant to an understanding that the fractional 0.27 share could be disposed of to the underwriting firm handling the transaction for $24.50 in cash for each fractional 0.27 share of new stock. The respondent returned the $36,750.00 as a dividend received from the Hanna Company (R. 6).

In December, 1931, the respondent was advised by the internal revenue agent in charge that the return reporting the amount of $36,750.00 as a dividend was considered correct, subject to the approval of the Bureau of Internal Revenue in Washington, D. C., and should subsequent information be received which would materially change the amount of tax, it would be necessary, under existing laws, to redetermine the tax liability (R. 6).

On June 15, 1932, the respondent filed a claim for refund in the amount of $420.00 on the ground that the profit resulting from the sale of 700 shares of the common stock of the Hanna Company, not the preferred stock here involved, had been incor-

rectly computed. This claim was allowed in full on September 24, 1932, and was paid with interest (R. 6).

In a letter dated October 6, 1932, following conferences with representatives of the Hanna Company, the Commissioner of Internal Revenue advised the internal revenue agent in charge at Cleveland, Ohio, that the amounts of cash received by the respondent and other stockholders of the Hanna Company represented proceeds from the sale of the fractional shares of new stock and that gain or loss from such sale should be determined upon the basis of the original stock in the hands of the respondent and the other stockholders (R. 6).

On or about February 2, 1933, the respondent filed a claim for refund of $995.52 upon the ground of a loss in 1930 because the respondent's shares of the capital stock of the American Cuptor Corporation and Bertha-Consumers Company became worthless in that year. Consideration and action upon this claim were delayed awaiting the outcome of litigation on the question of the worthlessness of the stock of American Cuptor Corporation in 1930. Subsequently, in 1936, this claim was rejected in part and was allowed in the amount of $160.00, which was refunded to respondent. (R. 7.)

On June 29, 1934, the respondent filed a claim for refund in the amount of $6,454.09 which stated that it was "filed as an amendment and amplification of claim for refund filed February 1, 1933." A statement attached to the claim set forth the ground that the sum of $36,750.00 was not a taxable divi-

dend but represented the proceeds of the sale of the fractional shares of new stock which resulted in a profit of $7,411.50 and an overpayment of tax of $6,454.09. (R. 7–8.)

In a letter dated November 2, 1935, the respondent was advised by the Commissioner that, while "the merits of the claim are allowable", it would be disallowed in full for the reason that "the facts in the case disclose that the claim filed in June 1934 was wholly unrelated to the claim filed on February 2, 1933, there being an independent demand based upon an entirely different issue. Therefore, it is held that the claim was not filed within the limitations prescribed by law and cannot be allowed." On December 16, 1935, official notice of rejection in full of this claim was mailed to the respondent.

The petition in this suit in the Court of Claims was filed on December 12, 1935 (R. 1). On February 8, 1937, judgment was entered by the Court of Claims for the respondent in the amount of $5,536.97 (R. 11).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that, under the facts and circumstances in this case, the respondent was entitled to a refund on the claim filed after the period of limitation had expired, but purporting to be an amendment to the prior claim timely filed.

2. In failing to hold that, under the facts and circumstances in this case, refund on the claim filed after the period of limitation had expired was barred by the statute of limitations, and that the

claim so filed could not be considered as an amendment to the timely claim, as it stated a new and different ground for refund or cause of action.

3. In failing to enter judgment for the United States and to dismiss the petition.

SUMMARY OF ARGUMENT

The untimely second refund claim, setting forth a specific ground different from and in no manner related to the specific ground set forth in the timely first claim, is not an amendment of the timely claim and is barred by the statute of limitations, as applied by this Court and by the Second and Sixth Circuit Courts of Appeals. *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *New York Trust Co.* v. *United States*, 87 F. (2d) 889 (C. C. A. 2d), pending on petition for rehearing of denial of petition for certiorari; *United States* v. *Richards*, 79 F. (2d) 797 (C. C. A. 6th), certiorari denied, 297 U. S. 718.

The fact that the Commissioner, through conferences with representatives of the Hanna Company, obtained information, before expiration of the period of limitation, which would support the ground set forth in the untimely refund claim is no reason to allow the late claim as an amendment of the timely claim.

The applicable Treasury regulation adopted pursuant to express authority granted in the statute of limitations states the same rule as the judicial decisions and expressly bars the late claim.

ARGUMENT

THE SECOND REFUND CLAIM WAS A WHOLLY NEW CLAIM AND WAS BARRED BY THE STATUTE OF LIMITATIONS

The income tax in question for the calendar year 1930 was levied pursuant to the Revenue Act of 1928 and was paid in quarterly installments in 1931, the last installment on December 15, 1931 (R 5–6). The Revenue Act of 1928, Sec. 322 (b) (1), provides that no refund shall be allowed or made after two years from the time the tax is paid, unless before the expiration of such period a claim therefor is filed by the taxpayer. The two-year period expired on December 15, 1933.

Revised Statutes, Sec. 3226, as amended by the Revenue Act of 1932, Sec. 1103 (a), provides that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax "until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; * * *."[1] The refund claim

[1] The Revenue Act of 1926, Sec. 1113 (a), and the prior Revenue Acts, contain this same provision. The Revenue Act of 1928 does not repeat this provision and as found in the Revenue Act of 1926 it remained in effect until the Revenue Act of 1932 was enacted. Section 1103 (b) of the Revenue Act of 1932 provides that in suits relating to part of a claim disallowed before its enactment on June 6, 1932, the statute of limitations shall be the same as provided before the Revenue Act of 1932 was enacted. The refund claims

filed on February 2, 1933, hereinafter called the first refund claim,[2] sought to recover $995.52 solely on the specific ground of a loss on shares of the capital stock of the American Cuptor Corporation and the Bertha-Consumers Company alleged to have become worthless in 1930 (R. 7). Action by the Commissioner upon the first refund claim was delayed awaiting the outcome of litigation in respect of the worthlessness in 1930 of the stock of the American Cuptor Corporation. In 1936 this first refund claim was rejected in part and allowed in the amount of $160, which was refunded to the respondent.

The refund claim, hereinafter called the second refund claim, filed on June 29, 1934, six months after the period of limitation had expired on December 15, 1933, sought to recover $6,454.09 on the specific ground that $36,750, erroneously included in the 1930 return as a taxable dividend received from the Hanna Company during 1930, represented proceeds from the sale of new preferred stock of the Hanna Company upon its recapitalization in 1929 and actually resulted in a profit

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here involved were disallowed after June 6, 1932. Therefore R. S., Sec. 3226 as amended by Sec. 1103 (a) of the Revenue Act for 1932 applies to this case.

[2] The refund claim filed on June 15, 1932, to recover $420 on the ground that the profit resulting from the sale of 700 shares of the common stock of the Hanna Company had been incorrectly computed, was allowed in full, and the amount was refunded (R. 6). This refund claim is not involved in this case.

of $7,411.50 rather than a dividend of $36,750 (R. 7–8).

The Commissioner disallowed the second refund claim for the reason that it was wholly unrelated to the first claim and was not filed in time (R. 8).

The court below allowed recovery on the second claim as an amendment of the first claim and held that this case is controlled by the principle of *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28; *Youngstown Sheet & Tube Co.* v. *United States*, 79 C. Cls. 683, certiorari denied, 293 U. S. 599; and *Con. P. Curran Printing Co.* v. *United States*, 15 F. Supp. 153 (C. Cls.), certiorari denied, April 26, 1937.

The Government contended in the court below, and contends here, that this case is governed by the rule announced in *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *New York Trust Co.* v. *United States*, 87 F. (2d) 889 (C. C. A. 2d), certiorari denied, June 1, 1937, petition for rehearing, on the ground that the petition in the present case was pending, now pending; *United States* v. *Richards*, 79 F. (2d) 797 (C. C. A. 6th), certiorari denied, 297 U. S. 718; *Bryant Paper Co.* v. *Holden*, 63 F. (2d) 370 (C. C. A. 6th), petition for rehearing denied with opinion, 65 F. (2d) 1012, certiorari denied, 290 U. S. 631; *Swedish Iron & Steel Corporation* v. *Edwards*, 1 F. Supp. 335 (S. D. N. Y.),

affirmed *per curiam* on the authority of the *Prentiss* case, 69 F. (2d) 1018 (C. C. A. 2d). The court below made no reference to these cases in its opinion.

The Government submits that a timely claim for refund for a stated amount on a specified ground cannot be amended, after the period of limitation has expired, by a second claim for a different and greater amount on a different specific ground which, under the Commissioner's administrative practice, was not considered in passing upon the first claim. *United States* v. *Henry Prentiss & Co., supra; New York Trust Co.* v. *United States, supra; United States* v. *Richards, supra; Bryant Paper Co.* v. *Holden, supra; Swedish Iron & Steel Corporation* v. *Edwards, supra.*

In the *Prentiss* case this Court held that a timely claim for refund for a stated amount on the specific ground that abnormal conditions affecting the taxpayer's invested capital and income required a special assessment under Sections 327 and 328 of the Revenue Act of 1918, which, under the statute and the administrative practice, required no consideration of the correctness of the evaluation of the taxpayer's invested capital, could not be amended by a second claim, after the period of limitation, setting forth evidence of the correct evaluation of invested capital and requesting a recomputation of the invested capital and of the tax under this normal method. This Court stated

that the conclusion that the second claim was wholly new and not an amendment of the first claim was required both by the procedural analogy to amendments of pleadings and by the necessities and realities of administrative practice, since the determination of the special assessment under Section 327 (d) of the Revenue Act of 1918 did not require and had no relation to a correct evaluation of invested capital.

Several cases have applied the rule of the *Prentiss* case and have approved the refusal of refunds in situations indistinguishable from the present case. In the *Bryant* case, *supra*, the timely claim was based on depreciation of land, buildings and machinery and the late claim was based on depreciation of a contract. Denying a petition for a rehearing after the decisions of this Court in the *Memphis*, *Prentiss* and *Factors* cases, the Sixth Circuit Court of Appeals distinguished the *Memphis* and *Factors* cases on the ground that they involved specific amendments relating to and explaining timely *general* refund claims and held that the specific late claim was a complete departure from the *specific* timely claim in the *Bryant* case and that, therefore, the case should be aligned with the *Prentiss* case.

In the *Richards* case, *supra*, the Sixth Circuit Court of Appeals followed its decision in the *Bryant* case, fully discussed the decisions of this Court on the question, and held that a specific re-

fund claim, based on a deduction of dividends on the ground they were paid out of capital, could not be amended, after the period of limitation, by a specific claim based on a deduction of the taxpayer's proportionate share of a partnership's excess profits taxes for 1917.

In the *New York Trust* case, *supra,* the Second Circuit Court of Appeals, in an opinion by Circuit Judge Swan discussing the decisions of this Court, held that a specific timely claim, based upon the inclusion of a wife's income in the calculation of surtax and upon depreciation, could not be amended by a late claim based on a deduction of a proportionate share of a partnership's excess profits taxes for 1917.

In the *Swedish Iron & Steel* case, *supra,* decided before the decisions of this Court on the question, the District Court held that a timely claim for a special assessment for 1918 under Section 210 of the Revenue Act of 1917 could not be amended by a late claim on the wholly different ground of a deduction of net loss for 1919. The court stated at page 337:

> To allow an entirely new ground for relief to be presented after the statutory period has [redacted] appears to me no different than to allow the original and only claim for refund to be filed at that time. Clearly the latter is forbidden by the statute. In my opinion, the former is also. * * *

The Government submits that the *Bryant, Richards* and *New York Trust* cases have correctly applied the rule of the *Prentiss* case by refusing to allow specific timely claims to be "amended" by late claims on wholly different specific grounds. In the present case the original timely claim clearly did not charge overpayment of taxes generally. The claim asked for a refund of a stated sum and specified particular facts and grounds why it should be refunded. This is not a case where the claimant left the grounds of challenge open in a general claim and where the Commissioner had only himself to blame for not promptly rejecting a general claim for insufficiency of form and insisting, at the outset, upon a full disclosure of the grievance. The ground of the first claim was stated specifically and the Commissioner was under a duty to consider only the limited question it presented concerning the worthlessness of the capital stock of the American Cuptor Corporation and the Bertha-Consumers Company.

The respondent asserted the second and additional claim for the first time on June 29, 1934. It was then too late to file a new claim for refund and, consequently, the respondent sought to assert the additional claim "as an amendment and amplification" of the first claim. The old claim sought refund of $995.52 and the new claim was made for $6,454.09. The old claim asserted refund should be made solely because the capital stock of the two

named corporations had become worthless in 1930. The new claim relied solely upon the entirely different and unrelated ground that the amount received from the Hanna Company, wholly unrelated to the other two corporations, and included in the return as a dividend was proceeds on sale of new stock.

Even the theories of recovery were different. The first claim did not question the correctness of gross income reported in the return but sought additional deductions from gross income. The second claim sought an adjustment of gross income by treating $29,338.50 of the amount of $36,750.00 which had been reported as dividends from the Hanna Company as the basis for the new stock which was sold and, therefore, as a return of capital and not as gross income. It is apparent that the investigation required to determine the merits of the first claim would not lead to a consideration of the grounds of the second claim.

The decisions of this Court relied upon by the court below, *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28, and also the case of *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, are clearly distinguishable. In the *Memphis, Factors* and *Moore* cases this Court held that timely *general* refund claims not specifying any grounds could be amplified and amended and explained by

specific amendments, after the period of limitation, in situations where, applying the analogy of pleadings in a law suit, such an amendment to a complaint would be allowed and where, under the usual administrative practice, the Commissioner, in considering the timely general claim, would be required to ascertain the facts and grounds later formally set forth in the late amendment.

In the *Bemis* case this Court held that timely refund claims for 1918 and 1919 for a special assessment on the three specific and independent grounds contained in Section 327 (a), (c) and (d) of the Revenue Act of 1918, accompanied by facts and arguments in support of each ground, could be amended, after the period of limitation, by a claim which contained "no change of importance, unless importance be attached to the form of the relief demanded." 289 U. S. 28, 32. The amendment added the alternative prayer for relief to the effect that if a special assessment were denied invested capital should be redetermined. This Court stated that the analogy to amendment of pleadings supported the amendment because the timely claims disclosed the facts and the substance of the grievance, omissions from invested capital, and the prayer for alternative relief was within the general rule that on trial relief appropriate to the facts pleaded will be granted, whether the pleader has prayed for it or not. This Court also stated that the administrative practice supported allowance of

the amendment because the Commissioner, in order to dispose of the timely claims, was required to ascertain whether the valuation of invested capital was wrong in a determinable amount and, having gone that far, the Commissioner should, as he did, redetermine invested capital. The amendment asked no more but was restricted to that question of invested capital.

The court below also relied upon its former decisions in *Con. P. Curran Printing Co.* v. *United States*, 15 F. Supp. 153, certiorari denied, April 26, 1937, and *Youngstown Sheet & Tube Co.* v. *United States*, 79 C. Cls. 683, certiorari denied, 293 U. S. 599. In the *Curran* case the timely claim was for "inadequate depreciation taken on the return, $17,641.30", among other reasons. The late claim was for depreciation of a leasehold which was not brought to the Commissioner's attention until the period of limitation had expired. Although the decision perhaps might have been placed upon the ground, suggested in the court's opinion, at page 158–159, that the timely refund claim was a general claim for depreciation which could be amended to claim a specific and additional item of depreciation, which is not clear from the findings of fact, the court chose to rely expressly upon the *Youngstown* case.

In the *Youngstown* case a timely refund claim on November 3, 1926, for $20,417.82 for 1922 on the specific ground of final determination of depletion depreciation and amortization of iron ore

property was followed by an audit which resulted in a determination, after the period of limitation expired, of a deficiency of $261,052.50 and then a redetermination by the Board of Tax Appeals on stipulation that the taxpayer had overpaid not only the sum demanded in the timely refund claim but also an additional sum of $53,875.69 based on different grounds of inventories, depreciation, obsolescence and depletion in addition to grounds in the timely claim. The Commissioner refused to refund the additional sum on the new grounds because they were not presented in a timely claim and they were thereafter set forth, after the period of limitation had expired, in a second claim. The Court of Claims allowed recovery of the additional sum and attempted to distinguish the *Prentiss* case on the ground that upon the audit of the timely claim the Commissioner considered all the facts which were later set forth in the second claim. It is submitted that this distinction is insufficient and that the *Youngstown* case was incorrectly decided because, even though the audit disclosed the facts, it was improper to allow an amendment of the first claim based on a specific ground by the second claim on different specific grounds and for an additional amount. Even this distinction is not present here because the first claim on specific grounds was not followed by an audit revealing the facts and grounds relied upon in the second claim.

The decisions of this Court permitting amendments do not permit the change of the first refund

claim here for a stated amount on the specific ground of worthlessness of stock of two corporations into a claim for a greater amount upon the wholly different specific ground of disposition of stock of a third corporation in no manner related to the other two corporations.

The two tests approved by this Court, (1) the analogy of amendments of pleadings and (2) the necessities and realities of administrative practice, disclose clearly that the second claim is wholly new and cannot be allowed as an amendment of the first claim.

1. Even under the most liberal rule of amendment of pleadings (*United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 68) a complaint stating a cause of action based upon the worthlessness of the stock of the American Cuptor Corporation and the Bertha-Consumers Company could not be changed by amendment, after the period of limitation had expired, into a cause of action based upon the disposition of the stock of the Hanna Company in a transaction wholly unrelated to the worthlessness of the stock of the other two corporations. Cf. *United States* v. *Seminole Nation*, 299 U. S. 417, 421–422; *B. & O. S. W. R. Co.* v. *Carroll*, 280 U. S. 491, 494; *Taylor Co.* v. *Anderson*, 275 U. S. 431, 439; *Union Pacific Ry.* v. *Wyler*, 158 U. S. 285, 296.

2. This Court has stated that sound judicial determination of the situations in which amendments

of refund claims are permissible after the period of limitations has expired must be based upon the realities of the administrative practice because such determination will regulate the conduct of the administrative officials. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 69; *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, 85.

A. The first claim did not require or suggest examination of the grounds of the second claim. Following the usual administrative practice, the first refund claim was considered, and allowed in part, solely on the specific grounds of worthlessness of stock upon which it exclusively relied. These grounds were narrow and not of a character calculated to suggest either the necessity of a general audit or an examination of the wholly unrelated grounds and facts later presented in the second claim. *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, 86.

B. The first claim was not a general one which the Commissioner might have promptly disallowed as formally defective in order to avoid the possibility of a later valid amendment. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 71; *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, 94. The Commissioner was required to pass upon the specific grounds contained in the first claim.

C. The second claim required examination of the records of a different taxpayer and a different commercial entity, the Hanna Company, which was in

no manner related to the two corporations concerned in the first claim, and thus forced the inquiry into paths far removed from those to which the original claim directed it. *New York Trust Co.* v. *United States,* 87 F. (2d) 889, 891; *United States* v. *Richards,* 79 F. (2d) 797, 801 (C. C. A. 6th). Therefore, the grievances presented by the first and second claims differ so essentially that the timely assertion of the first cannot aid the tardy assertion of the second. *United States* v. *Henry Prentiss & Co.,* 288 U. S. 73, 87.

All of these considerations indicate that the necessities and realities of the administrative practice involved where a refund claim on a specific ground is asserted require the conclusion that such a claim may not be amended, after the period of limitation has expired, by a second claim on different and unrelated specific grounds.

This conclusion that the respondent cannot recover on the second refund claim is not affected by the finding of fact that the Commissioner, following conferences with representatives of the Hanna Company and before expiration of the period of limitation, had advised the internal revenue agent in charge at Cleveland, Ohio, that the cash received by the respondent and other shareholders of the Hanna Company should be taxed in the manner later claimed too late in the second refund claim (R. 6–7). It does not appear that the Commis-

sioner advised the revenue agent that the respondent had overpaid the tax on this item. It does not appear that the Commissioner, in connection with this information, or otherwise, knew that the respondent or any other shareholder of the Hanna Company had overpaid a tax on this item until the second refund claim was filed. For all that appears from the complaint (R. 2) or the findings of fact (R. 6), the item of $36,750 received from the Hanna Company was reported in the return with the total of dividends of $110,891.50 without any explanation and so far as the Commissioner was advised, even after conferences with representatives of the Hanna Company, might have represented taxable dividends on other stock of the Hanna Company and not the amount received on the sale of new preferred stock.

The respondent cannot rely on the information obtained by the Commissioner from representatives of the Hanna Company as an amplification or explanation of the first refund claim which relied on wholly different grounds and made no reference to this information. It is clear that the administrative practice upon examination of a refund claim for $995.52 on the specific ground involving worthlessness of stock of two corporations would not include consideration of the fact that the taxpayer might be entitled to a refund of a greater amount on the wholly different ground that a reported dividend was proceeds of sale of stock of

a third corporation simply because some information about the sale of stock had been received from representatives of the third corporation.

The court below, however, in its opinion (R. 11) made the statement, not supported by the findings of fact, that the Commissioner had determined, before expiration of the period of limitation, that the respondent had overpaid the tax on the item later set forth in the second claim. The court then stated that action on the first claim required a redetermination of the entire tax liability, citing *Lewis* v. *Reynolds,* 284 U. S. 281. That case holds merely that where a taxpayer prevails on a specific ground for refund the Commissioner *may* reaudit the return and refuse the refund if the tax has not been overpaid.

The Commissioner is not *required* to determine whether a refund is due on a specific ground not related to the specific ground in the claim before him. The facts of this case illustrate the impossibility of observing such a requirement. An administrative system able to relate information received from a corporation to all of the refund claims of all the stockholders of the corporation relying on specific grounds not related to the corporation, has not been devised and is not needed where a simple and efficient determination of refund claims is obtained by requiring each claimant, to whom the facts are readily available, to set them forth in a timely refund claim.

Even if the fact that the respondent had overpaid the tax were brought to the attention of the Commissioner in some manner other than in a timely claim for refund, that circumstance would not satisfy the statutory requirement for a timely refund claim. *United States* v. *Richards*, 79 F. (2d) 797, 801 (C. C. A. 6th). In the *Richards* case the taxpayer in his return claimed a deduction for his proportion of the excess profits taxes of certain partnerships and the Commissioner in denying the deduction was advised of the taxpayer's contention. The court held, however, that this knowledge was no reason to allow the deduction to be asserted in a late refund claim as an amendment of a timely claim on another ground. The court stated at page 801:

> The required statutory method for bringing an overassessment to the attention of the Commissioner is by a timely claim for refund, and without such claim there is nothing upon which the Commissioner may act.

The construction of this Court's decisions which we have urged here has been adopted by the applicable Treasury regulations promulgated pursuant to the express statutory authority found in R. S., Sec. 3226, as amended (Sec. 1113 (a), Revenue Act of 1926), which provides that no suit shall be maintained to recover any internal revenue tax "until a claim for refund or credit has been led with the

Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; * * *." The applicable provision of law in regard to refund claims is Sec. 322 (b) (1) of the Revenue Act of 1928, *infra*, which provides that no refund shall be allowed unless a claim is filed within the two years after payment of the tax.

Prior to May 1, 1929, Treasury Regulations 74, Art. 1254, Revenue Act of 1928, provided in respect of the form of refund claims merely that "All facts relied upon in support of the claim should be clearly set forth in detail under oath."[3] This general provision was the only regulation in respect of the refund claims involved in the cases decided by this Court. In *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 66, this Court expressly recognized that this form of the Treasury regulation, involved in all the cases decided by this Court, had been changed by Treasury Decision 4265 in effect on May 1, 1929.[4] All of the cases herein discussed were decided on the basis of the former regulation.

The tax here involved was imposed for 1930 under the Revenue Act of 1928 and was paid in 1931. Treasury Decision 4265, adopted pursuant

[3] This same sentence also appeared as the only requirement for the form of refund claims in Treasury Regulations 69, Art. 1304, Revenue Act of 1926; Regulations 65, Art. 1306, Revenue Act of 1924, Regulations 62, Art. 1036, Revenue Act of 1921; Regulations 45, Art. 1036, Revenue Act of 1918.

[4] See Mim. 4092 of October 30, 1933, Cumulative Bulletin XII-2, pages 96, 97.

to the authority of R. S., Sec. 3226 as amended (Sec. 1113 (a) of the Revenue Act of 1926) provided in part that on and after May 1, 1929:

> (2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

The first refund claim was filed on February 2, 1933. Treasury Regulations 77, Article 1254, approved on February 10, 1933, and adopted pursuant to the authority of the same provision of law in R. S., Sec. 3226 as amended (Sec. 1103 (a) of the Revenue Act of 1932) continued the requirement of T. D. 4265 in practically the same language, as follows:

> ART. 1254. *Claims for refund by taxpayers.*—* * * The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to appraise the Commissioner of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period.[5]

[5] This provision is repeated without change in Article 322–3 of Regulations 86 and 94 under the Revenue Acts of 1934 and 1936.

The second refund claim, setting forth for the first time the ground of recovery now relied upon, was filed on June 29, 1934, and after expiration of the period of limitation on December 15, 1933. The respondent had almost a year after adoption of Treasury Regulations 77 on February 10, 1933, to comply with Article 1254 before the period of limitation expired.

Article 1254 prohibits a refund or credit on the second claim. R. S., Sec. 3226, as amended, prohibits maintenance of any suit to recover any internal revenue tax unless a claim has been filed according to the law and regulations. No such claim was filed and this suit cannot be maintained because the second refund claim was not filed according to the law and the valid regulation.

Treasury regulations which are adopted pursuant to statutory authority and which provide a reasonable means to enforce and administer the tax laws have the force of law and must be obeyed. *Morrissey* v. *Commissioner,* 296 U. S. 344, 354–5; *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *National Lead Co.* v. *United States,* 252 U. S. 140, 146; *Boske* v. *Comingore,* 177 U. S. 459, 469. One type of valid regulation supplies detailed rules for enforcement of the general terms of the statute, as in the present case. *Morrissey* v. *Commissioner, supra; Fawcus Machine Co.* v. *United States, supra.* The regulation involved here is authorized not only by the general authority granted

to the Commissioner, with the approval of the Secretary of the Treasury, to prescribe all needful regulations to enforce the Revenue Acts, Revenue Act of 1928, Sec. 62, but also by the specific statutory authority to regulate refund claims. R. S., Sec. 3226, as amended.

The fact that, in addition to the general statutory authority to prescribe regulations, specific statutory authority has been granted to regulate filing of refund claims indicates that Congress thought this matter of the time of filing refund claims particularly should be administered by regulations. The difficulty of application of the judicial tests, necessarily indefinite, by administrative officers to determine when a second refund claim is merely an amendment and therefore timely, supports the reasonableness of the regulation which sets forth a clear rule easily administered. Enforcement of this rule produces a fair and certain operation of the statute of limitations easily understood by the taxpayers as well as by the administrative officials.

Reenactment of the general statutory authority to make all needful rules and regulations, Section 62 of the Revenue Acts of 1932, 1934, and 1936, and reenactment of the specific statutory authority to make regulations concerning refund claims after adoption of T. D. 4265, Section 1103 (a) of the Revenue Act of 1932, is a clear indication of Congressional approval of the regulation. *Morrissey* v. *Commissioner, supra; Murphy Oil Co.* v. *Burnet,*

287 U. S. 299, 302–303; *Helvering* v. *Bliss*, 293 U. S. 144, 151; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Universal Battery Co.* v. *United States*, 281 U. S. 580, 583–585; *Brewster* v. *Gage*, 280 U. S. 327, 337.

The Government submits that the regulation which bars the refund here sought is authorized by statute, provides a reasonable rule which can be fairly and efficiently administered, and should now be enforced. Indeed, the regulation merely expresses the requirement of the statute of limitations determined by judicial decisions apart from the regulation.

CONCLUSION

The second refund claim presented a wholly new claim which was barred by the statute of limitations under the applicable judicial decisions and Treasury regulations. Therefore, this suit may not be maintained, and the judgment of the court below should be reversed.

Respectfully submitted.

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NOVEMBER 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 810, 861:

SEC. 62. RULES AND REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on allowance.*—

(1) *Period of Limitation.*—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * * *

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 1103. LIMITATIONS ON SUITS BY TAXPAYERS.

(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have

been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

Treasury Decision 4265, VIII–1 Cumulative Bulletin 110:

* * * * *

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed,

and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

* * * * *

Treasury Regulations 77, Revenue Act of 1932, Article 1254:

ART. 1254. *Claims for refund by taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, and should be filed with the collector of internal revenue. A separate claim on such form shall be made for each taxable year or period.

The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim

which does not comply with this paragraph will not be considered for any purpose as a claim for refund. With respect to limitations upon the refunding or crediting of taxes, see article 1257.

* * * * *

Treasury Regulations 74, Revenue Act of 1928, Article 1254:

ART. 1254. *Claims for refund by taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843. A separate claim on such form shall be made for each taxable year or period. All facts relied upon in support of the claim should be clearly set forth in detail under oath.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 48

THE UNITED STATES, PETITIONER

v.

MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

The brief of an *amicus curiae* now presents for the first time in this case the argument that the cause of action in a suit or refund claim to recover taxes is simply overpayment of the tax for the year in question and, therefore, the late specific claim is allowable as an amendment of the timely unrelated specific claim because it does not change the cause of action.

The Government submits that this contention ignores entirely the statutory and administrative system of regulation of refund claims which re-

quires a timely presentation of specific grounds for refund. If this broad contention, suggested by the discussion of amendments of general claims in the opinion of the Court of Claims in *Factors & Finance Co.* v. *United States,* 56 F. (2d) 902, were correct, this Court, affirming that decision on other grounds, *United States* v. *Factors & Finance Co.,* 288 U. S. 89, would have had no occasion to remark at page 94 that the "case is a close one" and that case, as well as *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, and *Bemis Bros. Bag Co.* v. *United States,* 289 U. S. 28, might have been decided without extended discussion simply on the ground that any timely claim, specific or general, may be amended at any time before rejection by a late unrelated specific claim because the "cause of action" was not changed. The analogy to amendments of pleadings and the rule against changing a cause of action after expiration of the period of limitations cannot be applied to defeat the requirement for timely specific claims.

Furthermore, the Government submits, the cause of action involved here is not overpayment generally, but overpayment of a particular amount on the specific ground of worthlessness of the stock of two corporations during the tax year, and that the late claim states a new cause of action for a different and greater amount on the unrelated ground of gain from sale of stock of a third cor-

poration.[1] In *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 67–69, this Court reviewed its own decisions discussing the nature of a cause of action for purposes of a late amendment of a complaint in cases not involving taxes and indicated that the general rule for pleadings aided determination of the allowable late amendments to refund claims. This Court then stated at page 69:

> The choice between these meanings [of the identity of a cause of action, i. e., mere fact of overpayment or particular grounds] must avoid a doctrinaire adherence to abstract definitions. It must keep in view the realities of administrative practice, for its effect will be to regulate the conduct of administrative officers.

The Government contends that both the analogy to pleadings and the realities of administrative practice indicate that a new cause of action was set up by the late claim in the present case.

1. It seems clear that generally, and apart from their relation to a tax refund in this case, the group of operative facts constituting the specific ground

[1] The statement in the lower court's opinion in *Lewis* v. *Reynolds*, 48 F. (2d) 515, 516 (C. C. A. 10th), quoted by this Court, 284 U. S. 281, 283, and repeated in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 70, to the effect that the question presented by a refund claim is whether the tax for the year has been overpaid, was used, not for the purpose which the *amicus curiae* now uses it to determine allowable amendments to refund claims, but for the entirely different purpose to determine the extent to which offsets might be applied against allowable refund claims.

of the untimely claim in the present case could not be substituted in a complaint for the facts constituting the ground of the timely claim after the period of limitations had expired. Cf. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 67–69, and cases therein discussed.[2]

2. The administrative practice does not support the contention that a specific claim, like a general claim, may be amended by a late unrelated specific claim. A general claim may be rejected promptly for failure to set forth specific grounds and in this manner the Commissioner may insist upon observance of the regulations which require a timely assertion of specific grounds. *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, 94; *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 71. The Commissioner must retain and determine a specific claim on the merits and the only method available for insisting upon a timely assertion of other unrelated specific grounds is by rejecting late claims as in the present case.

When a specific refund claim is filed it may present only a legal contention which can be determined without an audit or any examination of

[2] For example, if the respondent in one transaction had purchased the stock involved in the first and second claims from the same person, induced by actionable misrepresentations of value, a complaint stating a cause of action relying only on the purchase of the stock involved in the first claim could not be changed by a late amendment into a cause of action based on the purchase of the stock involved in the second claim.

facts. If the claim may be denied as a matter of law, there is no need to look for offsets. But if the claim is allowable as a matter of law, or if an audit is necessary to determine the validity of the claim, it is the prevailing administrative practice either to make an audit or to consider a prior audit made before the refund claim was filed, or to make a reaudit to determine the validity of the specific claim and to determine whether any offsets exist. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 70; *Lewis* v. *Reynolds*, 284 U. S. 281, 283.

It is not the purpose of that audit to uncover other specific grounds for refund not relied upon by the taxpayer. Of course, if a new ground is disclosed, the Commissioner will grant a refund, within the period of limitations, even without a refund claim. The consequences of the contention that every specific claim tolls the statute of limitations until rejection might seriously impede administration of the tax laws and certainly would restrict the operation of the public policy embodied in the statute of limitations in favor of a reasonable termination of tax litigation.[3]

[3] For example, under the contention of the *amicus curiae*, although a specific refund claim filed just before expiration of the period of limitations might require a long examination by the Commissioner, the taxpayer might assert any late unrelated specific claim which might occur to him or which intervening court decisions might suggest at any time before rejection of the timely claim. Logically, that second claim would in turn extend the statute until it was rejected and would permit further claims.

Finally, Treasury Decision 4265, and the succeeding similar regulations, embody the result of a long administrative experience in the regulation of refund claims under which it has been determined that every specific ground relied upon shall be presented in a timely claim. This regulation, adopted to facilitate administration of federal income taxes, should be enforced.

CONCLUSION

For the foregoing reasons and the reasons stated in the first brief for the United States the judgment of the court below should be reversed.

Respectfully submitted.

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DECEMBER 1937.

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In the Supreme Court of the United States

OCTOBER TERM, 1936.

No. [redacted] 48

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

MABEL S. ANDREWS,
Executrix of the Estate of Matthew Andrews,
Deceased.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF CLAIMS OF THE UNITED STATES.

BRIEF FOR MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED, IN OPPOSITION.

FRED R. SEIBERT,
Attorney for Mabel S. Andrews, Executrix of the Estate of Matthew Andrews, deceased.

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No. 967.

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In the Supreme Court of the United States

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BRIEF FOR MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED, IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Claims of the United States (R. 5-11) is reported in 17 Fed. Supp. 980.

JURISDICTION.

The judgment of the United States Court of Claims was entered February 8, 1937 (R. 11). Petition for writ of certiorari was filed May 8, 1937. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED.

Whether under the facts in this case, the basis of suit was incorporated in a timely claim for refund as subsequently amended.

STATUTES INVOLVED.

The statutes involved will be found in the Appendix, *infra*, pp. 10-11.

STATEMENT.

The facts were stipulated and the Court made and entered special findings of fact as part of its judgment (R. 5-8). The pertinent facts may be summarized as follows:

On or about March 15, 1931, respondent as Executrix of the Estate of Matthews Andrews, deceased, filed an individual income tax return for the calendar year 1930, showing a total tax liability of $12,800.30 which was duly paid in quarterly installments. The gross income shown on the return included the amount of $110,891.50, representing dividends from domestic corporations, $36,750.00 of which was erroneously reported as dividends received from The M. A. Hanna Company. This amount was derived from the sale of shares of stock of The M. A. Hanna Company received as a result of a re-capitalization of the Company in November and December, 1929 (R. 6).

In December 1931, respondent was advised by the Internal Revenue Agent in Charge that the return as filed, reporting the sum of $36,750.00 as dividends from The M. A. Hanna Company was considered as correct, with the added proviso that such finding was subject to the approval of the Bureau of Internal Revenue in Washington, D. C., and that should subsequent information be received which would materially change the amount of tax reported, it would be necessary, under existing laws, to redetermine the tax liability.

On June 15, 1932, respondent filed with the Collector of Internal Revenue a claim for refund in the amount of $420.00 on the ground that the profit resulting from the sale of 700 shares of the common stock of the Hanna Company had been incorrectly computed. This claim for $420.00

was allowed in full, Certificate of Overassessment issued by the Commissioner of Internal Revenue September 24, 1932 and paid with interest.

In a letter dated October 6, 1932, following conferences with representatives of The M. A. Hanna Company, the Commissioner of Internal Revenue advised the Internal Revenue Agent in Charge, at Cleveland, Ohio, that the amounts of cash received by respondent and other shareholders of the Hanna Company, as above stated, represented proceeds from the sale of the fractional shares of new stock, and that gain or loss from such sale should be determined upon the basis of the original stock in the hands of the respondent and the other shareholders.

On or about February 2, 1933, respondent filed a claim for refund in the amount of $995.52 based upon the grounds that losses had been sustained upon investments in stocks of certain corporations (R. 7). Subsequently, in 1936, this claim was rejected in part and allowed in part (R. 7).

On June 29, 1934, respondent filed a claim for refund in the amount of $6,454.90, which amount included the $995.52 on which claim was filed on February 2, 1933. This claim for $6,454.90 was filed as an amendment and amplification of claim for refund filed February 2, 1933. The basis of this claim was that the amount of $36,750.00 had been erroneously included as a dividend instead of being reported as proceeds from the sale of shares of stock of The M. A. Hanna Company (R. 7-8), and, as above stated, included the amount of $995.52 on which claim was filed on February 2, 1933. By letter dated November 2, 1935, respondent was advised by the Commissioner that while the merits of the claim were allowable it would be disallowed in full for the reason that it did not, in the opinion of the Commissioner, meet the requirements of the law. The claim was officially rejected by the Commissioner on December 16, 1935.

ARGUMENT.

The Court of Claims Properly Held, under the Facts in the Case, that the Basis of Suit was Incorporated in a Timely Claim for Refund as Subsequently Amended.

On February 2, 1933 respondent filed a claim for refund (R. 7). On June 29, 1934, while the claim of February 2, 1933 was being considered by the Commissioner, respondent filed a claim for refund stating therein as the basis, in addition to the basis stated in the claim of February 2, 1933, the grounds upon which suit was brought (R. 7-8). The second claim specifically related itself to the first. The Court of Claims held that under the circumstances the second claim was a proper amendment to the first and allowed recovery thereon.

The Court of Claims found as a part of its special findings of fact, that respondent was notified in December 1931, by letter from the Internal Revenue Agent in Charge at Cleveland, Ohio, that her return as filed reporting the sum of $36,750.00 as dividends was considered as correct with the added proviso that such finding was subject to the approval of the Bureau of Internal Revenue in Washington, D. C. and that should subsequent information be received which would materially change the amount of tax reported it would be necessary, under existing laws to redetermine the tax liability.

As the result of conferences with representatives of The M. A. Hanna Company, the Commissioner of Internal Revenue, by letter dated October 6, 1932, advised the Internal Revenue Agent in Charge at Cleveland, Ohio that the amounts of cash received by plaintiff and other shareholders of the Hanna Company represented proceeds from the sale of stock and that gain or loss from such sale should be determined (Fdg. 6, R. 6). This information was not conveyed to respondent although a promise was made by the Internal Revenue Agent in Charge in his letter of

December 1931, that should any facts be discovered which would change the tax liability, an adjustment would be made. The determination by the Commissioner that the dividends had been erroneously reported was made prior to the expiration of the statutory period within which a refund should have been allowed without the filing of a claim therefor, as provided in Section 322(a) of the Revenue Act of 1928 (Appendix Paragraph 1).

The Court of Claims in allowing recovery in the instant case followed its previous decisions in the case of *Youngstown Sheet and Tube Company v. United States,* 79 C. Cls. 683, certiorari denied 293 U. S. 599 and *Con. P. Curran Printing Company v. United States,* 15 Fed. Sup. 153, and cited in support thereof the decisions of this Court in *United States v. Memphis Cotton Oil Company,* 288 U. S. 62; *United States v. Factors and Finance Company, Inc.,* 288 U. S. 89 and *Bemis Brothers Bag Company v. United States,* 289 U. S. 28, wherein amendments of claims were permitted under certain facts and circumstances which were not essentially different from those present in this case.

Petitioner cites the case of *United States v. Henry Prentiss and Company,* 288 U. S. 73, as being contra to the decision of the court in this case. An examination of the opinion of the Court in the *Henry Prentiss and Company* case, discloses that the principle enunciated in that case does not apply under the facts in the instant case.

The first and only timely claim for refund filed in the *Prentiss* case, *supra,* was for special relief under Sections 327 (d) and 328 of the Revenue Act of 1918, which claim was sought to be turned by amendment after the statute had run to include a demand for refund which had come about through the undervaluation of invested capital with a consequent increase of the profits to be taxed. This

Court in denying the right to amend the claim very specifically stated its reasons as follows:

> "If the amendment is permissible, a request for the exercise of a discretionary jurisdiction will have been turned after the running of the statute * * * into a claim of error of law or fact and hence into a controversy within the jurisdiction of a court. What at the beginning was non-justiciable with exceptions few and narrow * * * will have become justiciable at the end."

In the instant case the issue presented in the original timely claim was an error of fact or law or both and resulted in a new audit of the entire case. The controversy in the present case was at all times within the jurisdiction of the Court. Furthermore in the *Prentiss* case the taxpayer by agreement prior to the filing of the amendment abandoned all grounds for refund except special assessment.

The Circuit Court of Appeals, Ninth Circuit, in the case of *Garbutt Oil Company v. United States,* decided April 28, 1937, allowed recovery of overpaid taxes on grounds set up in amendment to a timely claim after the expiration of the statutory period for filing a new claim. The facts in that case were similar to those in the instant case. That Court as did the Court of Claims in the present case relied upon the decision of this Court in the case of *Memphis Cotton Oil Company, supra.*

The petitioner in its brief has cited *Bryant Paper Company v. Holden,* 63 Fed. (2nd) 370 (C. C. A. 6th), certiorari denied 290 U. S. 631, *United States v. Richards,* 79 Fed. (2nd) 797 (C. C. A. 6th), certiorari denied 297 U. S. 718, *Swedish Iron and Steel Corporation v. Edwards,* 1 Fed. Supp. 335 and *New York Trust Company, Executor v. United States of America,* 87 Fed. (2nd), 889, in its contention that there is a diversity of opinion among the different courts as to the question in issue.

In the *Bryant Paper Company* case, *supra,* a claim was timely filed. Before the claim was rejected but after the statutory period for filing a new claim had expired another claim was filed asking for refund on a ground not in issue prior thereto. The second claim did not seek to relate itself to the first and appeared in the record as an independent claim. In the instant case the amended claim specifically related itself to the original and timely claim and covered an issue which had previously and within the statutory period been determined by the Commissioner.

In the *Richards* case, *supra,* a general claim had been filed within the statutory period. Later a specific claim was filed based on reallocation of dividends, an issue not in existence at the time of the filing of the general claim. This claim was rejected with permission to reopen it upon presentation of further evidence relative to allocation of dividends. When the taxpayer requested reopening he urged also on additional and unrelated grounds, namely, that he was entitled to a deduction of his share of excess profits taxes paid by two partnerships of which he was a member.

The Court held that the letter of the Commissioner rejecting the second claim barred further amendment except as limited in such letter and in its opinion on page 801 stated:

> "The Commissioner's rejection letter of June 3, 1925, was concededly not a final rejection of the claim based upon the disallowance as a deduction of corporation dividends. It was qualified by permission to reopen in the event that the allocation of dividends should thereafter be definitely determined."

An examination of the facts in the *Swedish Iron and Steel Company* case, *supra,* discloses that a timely claim for refund was filed and rejected on its merits. Later and after the statutory period for the filing of a new claim had

expired, letters were filed asking for a reaudit and reconsideration for the year involved. The Court held that since the letters were filed after the rejection of the original claim and after the expiration of the statutory period, that such letters could not constitute an amendment to the already rejected claim. It is respectfully submitted that the facts and principle involved in the *Swedish Iron and Steel Corporation* case are not comparable in any respect to those in the instant case.

In the *New York Trust Company* case, *supra,* a timely claim for refund had been filed and allowed in full. Later an alleged amendment was filed based upon claim for deduction of taxpayer's proportionate share of excess profits taxes. The Court held that even if the timely claim had not been rejected at the time of the filing of the alleged amendment to determine the merits of the amendment the Commissioner would be required to examine the records of another taxpayer and would be led into fields too far removed from those which the original claim directed. In the instant case the Commissioner and his agents had of their own volition determined the correct tax basis on the issue in suit. When the amendment to the original timely claim was filed the Commissioner was not led into strange and unexplored paths because within the statutory period he had determined the correct basis for the determination of the tax liability. The amendment was simply an adaptation of the relief to a case already determined by the Commissioner.

The petitioner on page 10 of its brief states that Treasury Decision 4265 which sets up the requirements of claims for refund has the force of law. We respectfully submit that such regulations can not have the force of law and cite in support thereof this Court's opinion in the case of *Manhatten General Equipment Company v. Commissioner,* 56 S. Ct. 397, which stated in part as follows:

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. * * * And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable."

The Court of Claims in the case of *American Safety Razor Corporation v. United*, 6 Fed. Supp. 293, reaffirmed in 7 Fed. Supp. 196, in refusing to follow Treasury Decision 4235 stated as follows:

"* * * Upon reason and authority, we are clear that the treasury decision was merely an erroneous construction of the statute by an administrative department and is not binding upon the plaintiff.

"What we have said above is not in accordance with the view taken in *Heebner v. United States*, 50 Fed. (2nd) 904. We do not agree with the doctrine laid down therein and do not think that a taxpayer is bound to take notice of treasury decisions in legal questions, or that even actual knowledge thereof would make them more binding."

This decision (*supra*) was followed by the Circuit Court of Appeals, Second Circuit in *Watts v. United States*, 82 Fed. (2d) 266.

CONCLUSION.

The opinion of the Court below is correct and is in accord with the principles established by this Court; the petition should, therefore, be denied.

Respectfully submitted,

FRED R. SEIBERT,
Attorney for Mabel S. Andrews, Executrix of the Estate of Matthew Andrews, deceased.

APPENDIX.

Revenue Act of 1928, C. 852, 45 Stat. 861.

SEC. 322. REFUNDS AND CREDITS.

"(a) Authorization. Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installments thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

"(b) Limitation on allowance.

"(1) Period of Limitation. No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer."

Revenue Act of 1932, C. 209, 47 Stat. 169.

SEC. 1103. LIMITATIONS ON SUITS BY TAXPAYERS.

"(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained whether or not such tax, penalty or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expira-

tion of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

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BRIEF FOR MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED.

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In the Supreme Court of the United States

OCTOBER TERM, 1937.

No. 48.

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

MABEL S. ANDREWS,
Executrix of the Estate of Matthew Andrews,
Deceased,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED.

OPINION BELOW.

The opinion of the Court of Claims of the United States (R. 5-11) is reported in 17 Fed. Supp. 980.

JURISDICTION.

The judgment of the United States Court of Claims was entered February 8, 1937 (R. 11). Petition for writ of certiorari was filed May 8, 1937 (R. 11). Petition for Certiorari granted October 11, 1937. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED.

Whether under the facts in this case the claim for refund filed February 2, 1933, as amended and amplified by claim for refund filed June 29, 1934, is sufficient compli-

ance with legal requirements to constitute a valid and timely claim for refund upon which this suit for the recovery of admitted overpayment of income tax for the year 1930 could be based.

STATUTES AND TREASURY REGULATIONS INVOLVED.

The statutes involved will be found in the Appendix, *infra*, pp. 15-17.

STATEMENT.

The facts were stipulated and the Court made and entered special findings of fact as part of its judgment (R. 5-8). The pertinent facts may be summarized as follows:

On or about March 15, 1931, respondent as Executrix of the Estate of Matthew Andrews, deceased, filed an individual income tax return for the calendar year 1930, showing a total tax liability of $12,800.30 which was duly paid in quarterly installments. The gross income shown on the return included the amount of $110,891.50, representing dividends from domestic corporations, $36,750.00 of which was erroneously reported as dividends received from The M. A. Hanna Company. This amount was derived from the sale of shares of stock of The M. A. Hanna Company received as a result of a recapitalization of the Company in November and December, 1929 (R. 6).

In December 1931, respondent was advised by the Internal Revenue Agent in Charge that the return as filed, reporting the sum of $36,750.00 as dividends from The M. A. Hanna Company was considered as correct, with the added proviso that such finding was subject to the approval of the Bureau of Internal Revenue in Washington, D. C., and that should subsequent information be received which would materially change the amount of tax reported, it would be necessary, under existing laws, to redetermine the tax liability.

On June 15, 1932, respondent filed with the Collector of Internal Revenue a claim for refund in the amount of $420.00 on the ground that the profit resulting from the sale of 700 shares of the common stock of the Hanna Company had been incorrectly computed. This claim for $420.00 was allowed in full, Certificate of Overassessment issued by the Commissioner of Internal Revenue September 24, 1932 and paid with interest.

In a letter dated October 6, 1932, following conference with representatives of The M. A. Hanna Company, the Commissioner of Internal Revenue advised the Internal Revenue Agent in Charge, at Cleveland, Ohio, that the amounts of cash received by respondent and other shareholders of the Hanna Company represented proceeds from the sale of the fractional shares of new stock, and that gain or loss from such sale should be determined upon the basis of the original stock in the hands of the respondent and the other shareholders.

On or about February 2, 1933, respondent filed a claim for refund in the amount of $995.52 based upon the grounds that losses had been sustained upon investments in stocks of certain corporations (R. 7). Subsequently, in 1936, this claim was rejected in part and allowed in part (R. 7).

On June 29, 1934, while the claim of February 2, 1933 was still under consideration respondent filed a claim for refund in the amount of $6,454.90, which amount included the $995.52 on which claim was filed on February 2, 1933. This claim for $6,454.90 was filed as an amendment and amplification of claim for refund filed February 2, 1933. The basis of this claim was that the amount of $36,750.00 had been erroneously included as a dividend instead of being reported as proceeds from the sale of shares of stock of The M. A. Hanna Company (R. 7-8), and, as above stated, included the amount of $995.52 on which claim was filed on February 2, 1933. Thereafter on September 4,

1934 a conference was held in the Commissioner's office on the issues set out in the above referred to claims. As a result of this conference and the consideration of the claims by the Commissioner a refund of $160.00 was allowed. By letter dated November 2, 1935 respondent was advised by the Commissioner that while the merits of the claim were allowable it would be disallowed in full for the reason that it did not, in the opinion of the Commissioner, meet the requirements of the law. The claim was officially rejected by the Commissioner on December 16, 1935.

ARGUMENT.

THE COURT OF CLAIMS PROPERLY HELD, UNDER THE FACTS IN THE CASE, THAT THE BASIS OF SUIT WAS INCORPORATED IN A TIMELY CLAIM FOR REFUND AS SUBSEQUENTLY AMENDED.

On February 2, 1933 respondent filed a claim for refund (R. 7). On June 29, 1934, while the claim of February 2, 1933 was being considered by the Commissioner, respondent filed a claim for refund stating therein as the basis, in addition to the basis stated in the claim of February 2, 1933, the grounds upon which suit was brought (R. 7-8). The second claim specifically related itself to the first and in addition to the grounds set forth in the first claim requested the Commissioner to make a further refund of the overpayment resulting from a discovery which he had made in 1932 within the statutory period in which a claim could have been filed. There was, therefore, no lack of notice to the Commissioner within the statutory period that respondent had overpaid her taxes. The Court of Claims held that under the circumstances the second claim was a proper amendment to the first and allowed recovery thereon.

The Court of Claims found as a part of its special findings of fact, that respondent was notified in December

1931, by letter from the Internal Revenue Agent in Charge at Cleveland, Ohio, that her return as filed reporting the sum of $36,750.00 as dividends was considered as correct with the added proviso that such finding was subject to the approval of the Bureau of Internal Revenue in Washington, D. C. and that should subsequent information be received which would materially change the amount of tax reported it would be necessary, under existing laws, to redetermine the tax liability.

In a letter dated October 6, 1932, following conferences with representatives of the Hanna Company, the Commissioner of Internal Revenue advised the Internal Revenue Agent in Charge at Cleveland, Ohio, that the amounts of cash received by respondent and other stockholders of the Hanna Company represented proceeds from the sale of the fractional shares of new stock, and that gain or loss from such sale should be determined upon the basis of the original stock in the hands of the stockholders (R. 6). This information was not conveyed to respondent although a promise was made by the Internal Revenue Agent in Charge in his letter of December 1931, that should any facts be discovered which would change the tax liability, an adjustment would be made. The determination by the Commissioner that the dividends had been erroneously reported was made prior to the expiration of the statutory period within which a refund should have been allowed without the filing of a claim therefor, as provided in Section 322 (a) of the Revenue Act of 1928 (Appendix Paragraph 1).

The Court of Claims in allowing recovery in the instant case followed its previous decisions in the case of *Youngstown Sheet and Tube Company v. United States*, 79 C. Cls. 683, certiorari denied 293 U. S. 599 and *Con. P. Curran Printing Company v. United States*, 15 Fed. Sup. 153, and cites in support thereof the decisions of this Court in *United States v. Memphis Cotton Oil Company*, 288 U. S.

62; *United States v. Factors and Finance Company, Inc.*, 288 U. S. 89 and *Bemis Brothers Bag Company v. United States*, 289 U. S. 28, wherein amendments of claims were permitted under certain facts and circumstances which were not essentially different from those present in this case.

In the *Memphis Cotton Oil Company* case, *supra*, this Court in distinguishing between functions of a statute from the functions of a regulation stated (p. 71):

> "The function of the statute like that of limitations generally is to give protection against stale demands. The function of the regulation is to facilitate research."

In the *Memphis Cotton Oil Company* case this Court definitely rejected the narrow technical rule in regard to amendment of claims for refund, contended for by the government, and adopted a fair and liberal rule. The Court definitely stated that the requirements of regulations are merely to facilitate research and may be waived by the Commissioner or may be complied with by the taxpayer at any time before the rejection of the claim.

It is submitted that the functions of the statute have been complied with in the instant case since a claim for refund giving the Commissioner jurisdiction was filed within the statutory period and the functions of the regulations have also been met since the research necessary for the determination of the issue in this case was made by the Commissioner in 1932 prior to the expiration of the statutory period for the filing of an original claim.

When consideration is being given a claim for refund, all facts available to the Commissioner should be considered. *Tucker v. Alexander*, 275 U. S. 228; *United States v. Factors and Finance Company, Inc., supra*; *Bemis Brothers Bag Company v. United States, supra*, and *Lewis v. Reynolds*, 284 U. S. 281. The court in the *Lewis* case (p. 283) stated:

> "The ultimate question presented for decision upon a claim for refund is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability."

This Court in *The Memphis Cotton Oil Company* case, *supra* (p. 70) stated:

> "No matter though the claim for refund be specific and limited, the Commissioner is at liberty to audit the return afresh and to strike a new balance as the facts may then appear."

In the *Bemis Brothers Bag Company* case, *supra*, the court in holding that the Commissioner after considering all facts available to him in examining a claim cannot stop until justice has been done (pp. 35-36), stated:

> "Once let it be ascertained that the amount is determinable and all that follows is an incident. At that point discovery has gone on to such a stage that the Commissioner may not rid himself of the duty of pressing forward to the end. He cannot in good conscience be satisfied with less. There may be need to take the case out of one section and transfer it to another before revision will be complete. All this is quite irrelevant when once a wrong is brought to light. There can be no stopping after that until justice has been done."

Petitioner cites the case of *United States v. Henry Prentiss and Company*, 288 U. S. 73, as being contra to the decision of the court below in this case. An examination of the opinion of this Court in the *Henry Prentiss and Company* case, discloses that the principle enunciated in that case does not apply under the facts in the instant case.

The first and only timely claim for refund filed in the *Prentiss* case, *supra*, was for special relief under Sections 327 (d) and 328 of the Revenue Act of 1918, which claim was sought to be turned by amendment, after the statute

had run, to include a demand for refund which had come about through the undervaluation of invested capital with a consequent increase of the profits to be taxed. This Court (p. 84) in denying the right to amend the claim very specifically stated its reasons as follows:

> "If this amendment is permissible, a request for the exercise of a discretionary jurisdiction, will have been turned after the running of the statute * * * into a claim of error of law or fact, and hence into a controversy within the jurisdiction of a court. What at the beginning was non-justiciable with exceptions few and narrow * * * will have become justiciable at the end."

In the instant case the issue presented in the original timely claim was an error of fact or law or both and resulted in a new audit of the entire case. The controversy in the present case was at all times within the jurisdiction of the Court. Furthermore in the *Prentiss* case the taxpayer by agreement prior to the filing of the amendment abandoned all grounds for refund except special assessment.

The petitioner in its brief has cited *Bryant Paper Company v. Holden*, 63 Fed. (2nd) 370 (C. C. A. 6th), certiorari denied 290 U. S. 631, *United States v. Richards*, 79 Fed. (2nd) 797 (C. C. A. 6th), certiorari denied 297 U. S. 718, *Swedish Iron and Steel Corporation v. Edwards*, 1 Fed. Supp. 335 and *New York Trust Company, Executor, v. United States of America*, 87 Fed. (2nd) 889.

In the *Bryant Paper Company* case, *supra*, a claim was timely filed. Before the claim was rejected but after the statutory period for filing a new claim had expired another claim was filed asking for refund on a ground not in issue prior thereto. The second claim did not seek to relate itself to the first and appeared in the record as an independent claim. In the instant case the amended claim specifically related itself to the original and timely claim and

covered an issue which had previously and within the statutory period been determined by the Commissioner.

In the *Richards* case, *supra*, a general claim had been filed within the statutory period. Later a specific claim was filed based on reallocation of dividends, an issue not in existence at the time of the filing of the general claim. This claim was rejected with permission to reopen it upon presentation of further evidence relative to allocation of dividends. When the taxpayer requested reopening he urged also an additional and unrelated ground, namely that he was entitled to a deduction of his share of excess profits taxes paid by two partnerships of which he was a member. The Court held that the letter of the Commissioner rejecting the second claim barred further amendment except as limited in such letter and in its opinion on page 801 stated:

> "The Commissioner's rejection letter of June 3, 1925, was concededly not a final rejection of the claim based upon the disallowance as a deduction of corporation dividends. It was qualified by permission to reopen in the event that the allocation of dividends should thereafter be definitely determined."

The facts in the *Richards* case clearly distinguish it from the instant case.

An examination of the facts in the *Swedish Iron and Steel Corporation* case, *supra*, discloses that a timely claim for refund was filed and rejected on its merits. Later and after the statutory period for the filing of a new claim had expired, letters were filed asking for a reaudit and reconsideration for the year involved. The Court held that since the letters were filed after the rejection of the original claim and after the expiration of the statutory period, such letters could not constitute an amendment to the already rejected claim. It is respectfully submitted that the facts and principle involved in the *Swedish Iron and Steel Corporation* case are not comparable in any respect to those in the instant case.

In the *New York Trust Company* case, *supra*, a timely claim for refund had been filed and allowed in full. Later an alleged amendment was filed based upon claim for deduction of taxpayer's proportionate share of excess profits taxes. The Court held that even if the timely claim had not been rejected at the time of the filing of the alleged amendment, to determine the merits of the amendment the Commissioner would be required to examine the records of another taxpayer and would be led into fields too far removed from those which the original claim directed. In the instant case the Commissioner and his agents had of their own volition determined the correct tax basis on the issue in suit. When the amendment to the original timely claim was filed the Commissioner was not led into strange and unexplored paths because within the statutory period he had determined the correct basis for the determination of the tax liability. The amendment was simply an adaption of the relief to a case already determined by the Commissioner.

The refusal of the Commissioner to allow the admitted overpayment in the instant case as indicated by his letter of November 2, 1935 (R. 3) was based upon plaintiff's failure to comply with Treasury Decision 4265 Cumulative Bulletin VIII-1 page 110. The statute, Section 322 of the Revenue Act of 1928, *infra*, was not changed in substance by corresponding sections of subsequent revenue acts which were enacted after the effective date of Treasury Decision 4265.. It is submitted that since there has been no change in the statutory requirement as to filing of a claim for refund of overpaid taxes the said Treasury Decision 4265 is of no force and effect in the instant case. This and other courts have refused to follow treasury decisions which place an unreasonable interpretation on an unambiguous section of the law.

The Supreme Court of the United States in the case of *Manhattan General Equipment Company vs. Commissioner,* 297 U. S. 129, 56 S. Ct. 397, very succinctly stated in its opinion (p. 134) the differentiation between departmental regulations and the statutes as follows:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. * * * And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. * * *"

The United States District Court for the Northern District of Oklahoma in *Lloyd Staton, Executor, vs. United States of America,* 9 Fed. Supp. 428, held that where a timely informal claim was filed and later amended on December 9, 1929, after the expiration of the statutory period of limitation for filing new claim, and subsequent to May 1, 1929, the effective date of Treasury Decision 4265, such claim was sufficient compliance with the statute to entitle the plaintiff to recover overpaid taxes.

It is submitted that the only legal requirement to authorize the Commissioner to refund overpaid taxes is that a claim be filed within the statutory period. Such requirement has been fully complied with in the instant case when claim for refund was filed February 2, 1933.

The necessary requirement for filing suit for recovery of overpaid taxes has been enunciated by this Court in the case of *Factors and Finance Company vs. United States,* 56 Fed. (2d) 902 (affirmed on certiorari 288 U. S. 89, 53 S. Ct. 287) (p. 906) as follows:

"However if the taxpayer desires to protect his right to a judicial review of the Commissioner's action, if he should not determine that a refund should be made, he should set forth the facts upon which he relies as entitling him to a refund. Such procedure on the part of the taxpayer is required by Section 3226 Rev. St. * * *"

It is submitted that the requirements of Section 3226 of the Revised Statutes have been met in the instant case since the limitation set forth in that section is that prior to filing suit a claim setting forth the specific basis therefor must have been filed. The claim filed June 29, 1934 definitely and specifically supplied the facts on which this suit was brought, which facts the Commissioner had acted upon almost two years prior thereto, such action having been set forth in letter dated October 6, 1932 (R. 6).

By the Commissioner's refusal to refund the admitted overpayment in this case respondent will ultimately be subjected to a further tax on the amount here in issue, which was erroneously taxed as dividends. Under the ruling of the Commissioner as set forth in his letter of October 6, 1932 (R. 6), the base of the new stock received upon the exchange set forth in (R. 6), will be reduced in the aggregate amount of the adjustment here under consideration. This, in effect, is a double tax on the same item which we submit was never contemplated or intended by any of the Revenue Acts. Respondent contends that such double taxation has been condemned by the Supreme Court of the United States in the case of *Bull vs. United States,* 295 U. S. 247, 55 S. Ct. 695. In the *Bull* case, an estate tax was paid as a result of including certain amounts in the gross estate of the decedent. Later the same amounts were included as income of the estate and an income tax paid thereon. In the instant case a tax was paid on the erroneous inclusion of an amount as dividends which same amount

will, as the result of having to reduce the base upon subsequent sale or disposition of the stock, be subject to a further tax. The Supreme Court in the *Ball* case, *supra,* permitted recoupment of the erroneously and illegally collected estate tax after the statute had expired on the ground that the retention of the money was "against morality and good conscience." The court in its opinion (pp. 260-261) stated, in part, as follows:

> "If that which the sovereign retains was unjustly taken in violation of its own statute the withholding is wrongful. Restitution is owed the taxpayer.
>
> "* * * The United States, we have held, cannot, as against the claim of an innocent party hold his money which has gone into its treasury by means of fraud of their agent. *United States v. State Bank,* 95 U. S. 30. While here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts in law to a fraud on the taxpayer's rights. What was said in the *State Bank* case applies with equal force to this situation. 'An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund.' * * *"

CONCLUSION.

In conclusion respondent submits:

1. That the amendment of June 29, 1934 including the basis of this suit being filed with the Commissioner prior to the rejection of the original claim was timely filed and was a valid amendment to the original claim filed February 2, 1933.

2. That the Commissioner in ruling on the issue herein involved by letter dated October 6, 1932 and in considering the amended claim of June 29, 1934, on its merits, waived any defects in or any objections to the timely claim

for refund as amended and can not now rely on such alleged defects as a defense to recovery in court.

3. That the refusal of the Commissioner to refund the admitted overpayment of tax will ultimately subject this plaintiff to an adjustment of the base of the stock on the subsequent sale or disposition which will be equivalent to a duplicate tax on the amount of adjustment involved in this action.

4. This action is based on a valid and proper claim for refund.

5. The judgment of the United States Court of Claims should be sustained.

Respectfully submitted,

FRED R. SEIBERT,

Attorney for Respondent.

Dated November 29, 1937.

APPENDIX.

Revenue Act of 1928, c. 852, 45 Stat. 791, 861:

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on allowance.*—

(1) *Period of Limitation.*—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 1103. LIMITATIONS ON SUITS BY TAXPAYERS.

(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expira-

tion of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

Treasury Decision 4265, VII-1 Cumulative Bulletin Page 110:

* * * * *

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

* * * * *

Treasury Regulations 77, Revenue Act of 1932, Article 1254:

ART. 1254. *Claims for refund by taxpayers.*— Claims by the taxpayer for the refunding of taxes,

interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, and should be filed with the collector of internal revenue. A separate claim on such form shall be made for each taxable year or period.

The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund. With respect to limitations upon the refunding or crediting of taxes, see article 1257.

* * * * *

Treasury Regulations 74, Revenue Act of 1928, Article 1254:

ART. 1254. *Claims for refund by taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843. A separate claim on such form shall be made for each taxable year or period. All facts relied upon in support of the claim should be clearly set forth in detail under oath.

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IN THE

Supreme Court of the United States

October Term, 1937

No. 48

THE UNITED STATES, *Petitioner,*

v.

MABEL S. ANDREWS, *Executrix of the Estate of Matthew Andrews, Deceased.*

PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF

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IN THE

Supreme Court of the United States

October Term, 1937

No. 48

THE UNITED STATES, *Petitioner,*

v.

MABEL S. ANDREWS, *Executrix of the Estate of Matthew Andrews, Deceased.*

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The undersigned respectfully petitions this Court for leave to file the subjoined brief as a friend of the Court.

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BRIEF AMICUS CURIAE

The amicus curiae desires to call the Court's attention to an historical approach to the present problem, believing that such approach may be helpful. He was present before this Court at the oral argument of the cases of *United States* v. *Factors & Finance Co.*, 288 U. S. 89, *United States* v. *Henry Prentiss & Co. Inc.*, 288 U. S. 73, and *United States* v. *Memphis Cotton Oil Company*, 288 U. S. 62. *After the oral submission of those cases* and with the consent of the Court and *of both counsel*, a brief was filed by the present amicus.[1] This Court's attention is respectfully directed to that brief which is printed as an appendix hereto. It shows that the question before the Court in those cases was admittedly narrowed to the fundamental problem of what constitutes a cause of action for overpayment of income tax and did not turn upon the argument now presented by the United States, viz: that a general claim can be amended at any time before final rejection but a specific claim cannot be so amended.

It is submitted that this Court in its decisions in *United States* v. *Memphis Cotton Oil Co.* and *United States* v. *Factors & Finance Co., supra,* fundamentally adopted the well reasoned opinion of Judge Littleton in the Court of Claims opinion in the *Factors & Finance Co.* case, 56 Fed. (2d) 902. This Court, however, found it necessary to limit that opinion in so far as, but no farther than it might conflict with the situation presented by the case of *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73.

Specifically, what was the conflict or differentiation between the *Factors & Finance Co.* case and the *Henry Prentiss & Co.* case? It is submitted that it was not that the original claim was general in one case and specific in the other. The real distinction was that in one case the orig-

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[1] The Court is also respectfully referred to the amicus brief filed by counsel in *Bemis Bros. Bag Co.* v. *United States* (No. 515, October Term 1932), 289 U. S. 28.

inal claim for refund was based upon a recomputation of the tax upon statutory grounds while in the other case the original claim for refund was based upon a request for special assessment of the tax under section 327(d) of the Revenue Act of 1918. Such a claim for refund does not ask the Commissioner of Internal Revenue to determine any statutory rate of tax liability; it specifically asks him to disregard the statutory method of computing taxes and to compute taxes on the basis of comparative rates of tax of similarly circumstanced taxpayers.[2]

As was said by this Court in *Bemis Bros. Bag Co.* v. *United States*, 289 U. S. 28, in reaffirming its position in the *Henry Prentiss & Co.* case:

> "The one 'assumes adherence to the statute in the valuation of invested capital, and counts upon extraordinary conditions as justifying a claim that the statute is oppressive.' The other, rejecting that assumption, is *a demand for a new audit.*" (Italics supplied.)

A claim for refund under the special assessment sections of the law was an appeal to the discretion of the Commissioner, not reviewable by the courts. To amend such a claim, after the statute had run on a new claim, to set up a claim for refund on a computation at statutory rates, over which the courts would have jurisdiction, would obviously be a departure from the cause of action stated in the claim. But if the demand in the claim for refund is based upon a statutory computation of the income, requiring a new audit to determine the tax liability, all audit items or adjustments are open for determination. The question for determination, the cause of action, is the overpayment of the tax. (See the prior amicus brief attached as an appendix.) Certainly, this was the meaning of this Court's language in the *Memphis Cotton Oil* case, *supra*, when it

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[2] Admittedly, net income must be determined before there can be a computation under sections 327 and 328 but it is not the determinative factor in deciding whether or not there is an overpayment of tax. Cf. *Welch* v. *Obispo Oil Co.*, — U. S. ——, 57 S. Ct. 684.

mentioned the cogent analogy of *Lewis* v. *Reynolds*, 284 U. S. 281, and then went on to say:

> "'The ultimate question presented for decision upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability.' No matter though the claim for refund be specific and limited, the Commissioner is at liberty to audit the return afresh and to strike a new balance as the facts may then appear."[3]

In the same category as special assessment under section 327(d) should be placed a claim asserting the bar of the statute of limitations. Both these types of cases disregard the statutory merits of the tax and state in substance that because of a peculiar condition, having no relationship to the statutory computation of the tax, there should be a refund.

Counsel accordingly submits that there are three types of causes of action for the recovery of taxes, namely: (1) special assessment under section 327(d), (2) overpayments resulting from the bar of the statute of limitations, and (3) the statutory computation of tax liability. Amendment within the scope of any one of the three grounds is permissible but a taxpayer cannot jump from one to the other after the time has expired for filing a new claim.

To limit the scope of the prior decisions of this Court to the position *now* contended for by the United States (Brief, p. 14), namely, that general claims can be amended prior to rejection but that specific claims cannot, only leads to illogical and inequitable results. In the first place, it would punish those taxpayers who attempt to be accurate and precise while rewarding those taxpayers who are careless. It would punish those taxpayers who conscientiously

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[3] It would seem axiomatic that the Commissioner would carefully audit all items of a return for a possible offset before allowing an overpayment of taxes. *Lewis* v. *Reynolds*, *supra*. If this be true, it is patent that a specific claim compels just as much of an investigation as a general claim, so that a later amendment would be germane to the original claim. See page 4 of petitioner's brief.

believe they have overpaid their taxes and have carefully worked out the details of a claim so as to assist the Commissioner in the reaudit, while rewarding those taxpayers who, without any preconceived knowledge of whether or not they have a just claim against the Government, file a general or "blanket" claim on "general principles."

And if a general claim paves the way for later amendment, what constitutes such a general claim? Certainly, it must be admitted by the petitioner that even though a claim be specific it is subject to amendment prior to rejection if it has a "blanket" statement also attached. Cf. *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373. Suppose the specific portions of the claim result in the computation of an overpayment of tax of $5,000. However, the taxpayer in preparing the claim inserts a figure of $10,000 as the amount to be refunded. It is submitted that such procedure would be as much of a general claim as was involved in the *George Moore Ice Cream Co.* case, *supra*. Carry the situation one step further. On all the refund claim forms up to June 1930, the following language was printed:[4]

"or such greater amount as is legally refundable."

Since 1930 many taxpayers have made a general practice of typing in such language. Does not such language also constitute a general claim permitting, under the petitioner's contention, the subsequent amendment of the claim prior to its rejection?

It is submitted that the petitioner's position can only lead to absurd results and would be the source of endless litigation in disputes as to what constitutes a general claim. The acceptance of the theory advanced by this amicus brief, which, it is submitted, is merely a restatement of the position already adopted by this Court will definitively

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[4] Form 843, Treasury Department, Internal Revenue Service. Cf. p. 5809 of Volume II, 1929 C. C. H. with p. 6016 of Volume IV, 1930 C. C. H.

settle the question, accomplish justice and, as pointed out by Judge Littleton in his opinion in *Factors & Finance Co., supra,* accomplish the fundamental purposes of the statute.

Respectfully submitted,

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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1932

UNITED STATES OF AMERICA
v.
FACTORS & FINANCE COMPANY, INC. } No. 141

UNITED STATES OF AMERICA
v.
HENRY PRENTISS & CO., INC. } No. 234

UNITED STATES OF AMERICA
v.
MEMPHIS COTTON OIL COMPANY } No. 308

BRIEF AMICI CURIAE

THE OVERPAYMENT OF INCOME AND PROFITS TAXES FOR A GIVEN YEAR IS A SINGLE CAUSE OF ACTION.

During the course of the oral argument before this Court in *United States of America* v. *Factors & Finance Co.*, No. 141, the Assistant Attorney General, Mr. Rugg, made a statement to the effect that **claims for refund may be amended after the statute of limitations has run against the filing of a new claim provided the amendments set up no new cause of action.** During the course of the argument of each of the above entitled cases Mr. Rugg urged that the amendment relied on by the taxpayer set up a new cause of action.

We agree with Mr. Rugg's preliminary statement of law to the effect that amendments might be filed prior to action by the Commissioner on the original claims, provided they set up no new cause of action. This is completely analogous to established court procedure. Once jurisdiction is vested in the court, the original declaration or petition may be amended even after the statutory period of limitations has expired for the filing of a new petition, provided the amending petition or declaration sets forth no new cause of action.

The question, therefore, involved in the cases under discussion resolves itself into: what constitutes a cause of action for overpayment of income tax? We submit that **it is the overpayment of the tax for a given year that constitutes the cause of action**—not the method by which it is computed. Precedent clearly shows that the federal income and excess profits taxes of any taxpayer for any given year constitute but a single cause of action. The ultimate question to be decided by the Commissioner, the Board of Tax Appeals, or the Courts in any Federal tax controversy or case is: **how much has the taxpayer overpaid (or underpaid) his tax for the year?**

Section 252 of the Revenue Act of 1918, which is similar to sections of the other acts dealing with claims for refund, provides:

> "That if, upon examination of any return of income made pursuant to this Act * * * it appears that an **amount of income, war-profits or excess-profits tax has been paid in excess of that properly due**, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of **the excess shall be credited against any income, war-profits or excess-profits taxes**, or installment thereof, then due from the taxpayer **under any other return, and any balance of such excess shall be immediately refunded** to the taxpayer * * *."

This Court interpreted that section in *Blair* v. *Birkenstock*, 271 U. S. 348. The question involved was whether

a taxpayer was entitled to interest on an overpayment of a quarterly installment of its 1919 income taxes when at the time of the payment of the installment the correct amount of the tax for the year had not been paid. This court decided that there should be no interest on the overpayment of the installment while there were still outstanding unpaid taxes for the year, saying:

> "Under Sections 250 and 252 of the Act of 1918, there is no provision for a refund to the taxpayer of any excess payment of a quarterly installment, when the whole tax for the year has not been paid. Read together, these sections show that the mere overpayment of an installment is treated as a payment on account of the tax which is assessed for that year, and is not a 'tax erroneously or illegally assessed or collected,' within the meaning of the refund provisions of Section 1019 of the Act of 1924, and so is not subject to its provisions regulating the allowance of interest."

This case clearly shows that while there may be an error in the computation of a Federal income or excess profits tax, that error does not give rise to a cause of action upon which a refund may be recovered. It is the **overpayment of the taxes for the year that is the cause of action** and not errors in individual items which are involved in the computation of the tax.

This principle is further emphasized in *Lewis et al.* v. *Reynolds*, 204 U. S. 281. The Commissioner had asserted a deficiency in taxes against the plaintiff. The plaintiff paid the additional taxes and filed a claim for refund. The Commissioner found that the plaintiff was entitled to have his net income reduced by the items indicated in the refund claim, but at the same time the Commissioner found other additions to the plaintiff's net income offsetting the reductions conceded. Accordingly, though the statutory period during which the Commissioner could assert a further deficiency in taxes had run, he claimed that he could offset the items of reduction from income by the

items that increased the income **because the sole cause of action before the court was the determination of whether there had been an overpayment of the plaintiff's taxes.**

This Court, after citing Section 284 of the Revenue Act of 1926 and Section 322 of the Revenue Act of 1928 adopted the following language of the Circuit Court of Appeals:

> "The above quoted provisions clearly limit refunds to overpayments. **It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax.** This involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax.
>
> "The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him."

The Treasury Department and the Bureau of Internal Revenue have themselves ruled that the question involved in any tax case is whether or not the tax has been overpaid. T. D. 3251, 5 C. B. 245; L. O. 1080, 5 C. B. 246; G. C. M. 9800, X-43-5266 (p. 18). See also *Anderson* v. *Farmers' Loan & Trust Company*, 241 Fed. 787, and *Atlanta Casket Co.* v. *Rose*, 22 Fed. (2d) 800.

The Board of Tax Appeals recognizes that there is but one cause of action before it (for any one taxable year) in any proceeding, namely, the correct amount of the tax for the year. *Appeal of Barry*, 1 B. T. A. 156; *Appeal of Hickory Spinning Co.*, 1 B. T. A. 409; *Appeal of Hotel de France*, 1 B. T. A. 28; *Appeal of Magdalena W. DeSabichi*, 4 B. T. A. 445; *Charles C. Coughlin*, 15 B. T. A. 515.

Accordingly, when a taxpayer has sought to amend a petition to the Board, after the expiration of sixty days from the Commissioner's notice of deficiency, the Board has refused to permit him to bring in a different taxable

year which would constitute a new cause of action, *Wald* v. *Commissioner*, 8 B. T. A. 1003, but where no different taxable year is involved, the Board holds that a shift of theory, or reliance upon items of computation not previously mentioned, does not constitute setting up a new cause of action, for the only cause of action is the underpayment (or overpayment) of the year's taxes. In the *Peruna* case, 11 B. T. A. 1180, 1188, the Board said:

> "In determining whether an amendment states a new or different cause of action from that set forth in the original pleading **the nature of the action in general must be considered.** [Citations.] What is the nature of the action in general under the original petition? Can it be questioned that it is **the review by this Board of the final determination of tax deficiency for a certain period and that this, and no more, is asked by the amended petition?"**

See also *Krueger Broughton Lumber Co.*, 18 B. T. A. 1270; *Marion Shainwald Sevier*, 14 B. T. A. 709.

Similarly, when the Commissioner has once obtained jurisdiction of a valid original claim for refund (not a mere caveat) his power to determine an **overpayment**, is not limited to the theory, grounds or items of computation that might be the basis of determining it.

The receipt of the amending claim by the Commissioner is similar to the receipt of an amended petition on declaration by a court. He may consider the new arguments under his original jurisdiction. (This is, of course, entirely different from cases where the new contentions are never presented to the Commissioner, but raised for the first time before a court, e. g. *U. S.* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269.) As was said in *St. Louis & S. F. R. R. Co.* v. *Loughmiller*, 193 Fed. 689:

> "When the petition, however inaccurately, imperfectly or inartistically drawn, is sufficient in allegations of fact **to show the claim** asserted therein by plaintiff **is based on the statute creating the right of**

> **action**, and is brought by the person on whom the statute confers such right, it may be amended at any time, and the amendment will relate back to the date of the institution of the action. [Citing cases.]"

See also *Illinois Surety Co.* v. *U. S.*, 215 Fed. 334, 339; 14 Op. A. G. 615.

No new cause of action having been set up by the amendments to the claims, under Mr. Rugg's concession they were properly received and should have been considered in the Commissioner's determinations.

The judgments of the courts below should be affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 48.—October Term, 1937.

The United States, Petitioner,
vs.
Mabel S. Andrews, Executrix of the Estate of Matthew Andrews, deceased.

On Writ of Certiorari to the Court of Claims.

[January 3, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

In this case we are called upon to determine whether a claim for refund of income tax, asking repayment of a definite sum upon a specific ground, is susceptible of untimely amendment to recover a greater sum on a new and unrelated ground.

The respondent, on behalf of the estate she represented, paid the income tax shown to be due by her return, which exhibited an item of gross income of $110,891 as "dividends from domestic corporations". Of this total $36,750 was erroneously reported as dividends from the M. A. Hanna Company. This amount was paid her pursuant to a recapitalization of the company in which the estate owned preferred stock and, instead of being returned as a dividend, should have been treated as giving rise to a capital gain of $7411.50.

In December 1931 the respondent was advised by an Internal Revenue agent that her return, reporting the receipt as a dividend, was considered correct, subject to the approval of the Bureau in Washington, and that if later information should indicate a material change in the amount of tax the statutes would require a redetermination of tax liability. October 6, 1932, as a result of conferences with representatives of the Hanna Company, the Commissioner of Internal Revenue advised the Agent in Charge at Cleveland, Ohio, that the cash received by preferred stockholders in the recapitalization of the company represented proceeds from a sale and that gain or loss therefrom should be determined upon

the basis of the cost of the original stock. The respondent was not notified of the ruling until August 22, 1934.

February 1, 1933, respondent filed a claim for the refund of $995.52, based upon an alleged loss in the taxable year due to the worthlessness of stocks of two corporations. Consideration and action thereon were delayed pending the outcome of litigation which would affect the soundness of the claim. In 1936 this claim was rejected in part but allowed to the extent of $160, which was refunded.

June 29, 1934, after expiration of the statutory period for filing refund claims,[1] the respondent presented a claim for $6,454.09 in which she stated that it was "filed as an amendment and amplification of claim for refund filed February 1, 1933" and asserted that the sum of $36,750 reported as a dividend was not such but represented the proceeds of sale of stock of the Hanna Company at a profit of $7,411.50 and that the error in the return resulted in an overpayment of $6,454.09.

November 2, 1935, the Commissioner advised the respondent that, while an overpayment had been made, a refund would be denied because the claim of June 1934 was wholly unrelated to that of February 1, 1933, being an independent demand based upon an entirely different ground. Pursuant to the Commissioner's holding that the latter claim was not filed within the period prescribed by law and, therefore, could not be allowed, official notice of rejection was mailed December 16, 1935. The respondent brought suit in the Court of Claims which gave judgment for her in the amount of $5,536.97.[2]

Upon petitioner's representation that the decision is in conflict with decisions of this court and of two circuit courts of appeals we granted the writ of certiorari. We hold that the so-called amendment was in fact a new claim and its allowance was barred by the statutory provision limiting the time for presentation of claims for refund.

Notwithstanding the reliance of each of the parties on recent decisions of this court none of them rules the precise question now presented. They point the way, however, to a correct decision.

In *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, the claim merely stated that there had been an erroneous overpayment

[1] Revenue Act of 1928, Ch. 852, Sec. 322 (b) (1), 45 Stat. 791, 861.
[2] 17 F. Supp. 980.

the amount of which was shown by stating the taxpayer's true net income, the tax due thereon, and the amount previously paid. The claim asked repayment of the difference or any greater sum which might be found to be due. Upon the footing of this general claim a complete audit of the taxpayer's books was made and an overpayment in excess of the amount claimed was determined. After notification of this fact, but before rejection, the taxpayer amended the claim by making it specific and setting forth the supporting facts in detail. The amendment was held effective.[3]

In *United States* v. *Factors & Finance Co.*, 288 U. S. 89, additional assessments were made subsequent to payment of the amount shown to be due by the respondent's return. After paying part of the sum so assessed the taxpayer filed a claim for abatement of the unpaid balance. In connection with that claim the Commissioner ordered a full examination of the taxpayer's affairs, which was made. While this audit was in progress the taxpayer filed a claim for refund, couched in general terms, stating that, as there had been no final audit of its return, the purpose of the claim was to save the taxpayer's rights under the statutes and permit the Commissioner to refund any excess paid beyond the amount found to be due. No statement of grounds for the claim was included. After the period of limitations had expired an amended claim was filed setting forth the grounds in detail and asking special assessment under Section 210 of the Revenue Act of 1917. In the interval between the filing of the first and the amended claim the Commissioner had disposed of the claim for abatement but not of the claim for refund. After the receipt of the amendment the Commissioner considered the case on the merits and found that the taxpayer's invested capital could not be satisfactorily ascertained and that a special assessment should have been made under Section 210 but he rejected the claim on the ground that the amendment was not timely. We held the amendment permissible. The opinion points out that the very generality of the original claim required that the Commissioner's audit go into the question of invested capital and that, therefore, the more specific amendment called attention to no new matter not covered by the investigation the Commissioner had to make in examining the claim as originally filed.

[3] See also Moore Ice Cream Co. v. Rose, 289 U. S. 373, 384.

In each of these cases the claim failed to comply with a Treasury Regulation requiring that the grounds for the relief demanded should be set forth under oath and in detail. We held that while the Commissioner might promptly have rejected the claims for failure to comply with the regulation such compliance was a matter he could waive and, if he considered the merits, the claim was susceptible of any amendment which would not amount, under the rules of pleading in actions at law, to an alteration of the cause of action and would not require the Commissioner to make a new and different inquiry than that which he was called upon to make in order to consider the general grounds asserted in support of the claim as presented.

In *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28, the taxpayer, in its original claim for refund, requested a special assessment under Sections 327 and 328 of the Revenue Act of 1918 and submitted a supporting statement as to its affairs wherein it sought relief on three distinct grounds specified in the sections in question and submitted facts and arguments in support of each of the grounds. Two of these grounds called the Commissioner's attention to the fact that the taxpayer's invested capital had been erroneously computed. After consideration of the claim the Commissioner notified the taxpayer that there was no basis for relief under Section 327 (b), which furnished one of the grounds put forward by the taxpayer, but he apparently overlooked the circumstance that relief was also claimed under subdivisions (a) and (c) of that section. The taxpayer filed a protest and an amendment, which made no change of any importance in the facts and arguments already submitted, but asked that computation of the tax under Section 328 be granted or, in the alternative, certain items the Commissioner had stricken from invested capital be restored. Since the original notice to the Commissioner was to the effect that valuable assets had been omitted from invested capital it would have been open to the taxpayer in the first instance to ask for relief under Section 327 and 328 or, in the alternative, for a recomputation of its invested capital in accordance with the facts set forth in the original claim. The mere addition of the prayer for alternative relief was not a departure from the claim and did not amount to a new and untimely claim but constituted a proper amendment.

In *United States* v. *Henry Prentiss & Co., Inc.*, 288 U. S. 73, a situation materially differing from those involved in the foregoing cases was presented. There the taxpayer's claim for refund asserted that, owing to abnormal conditions affecting invested capital and income, there could be no fair computation of the tax by the appraisal of the cash value of its property under Section 326 of the Revenue Act of 1918 and it should, therefore, have the benefit of a special assessment under Sections 327 and 328, which provide for computation of the tax in such cases without reference to the value of the invested capital and for determination of the tax according to the ratio which the average tax of representative corporations engaged in a similar business bears to their average net income. In response to the claim the Commissioner advised the taxpayer that he could not consider the propriety of a special assessment until the statutory net income and invested capital were determined and asked the taxpayer, therefore, to acquiesce in the net income and invested capital shown in the Revenue Agent's report or submit any exceptions it might have thereto. The taxpayer filed no such exceptions but apparently acquiesced in the determination. The Commissioner then proceeded on the basis of the facts he had ascertained and advised the taxpayer the case was not one for special assessment and the claim would be rejected. Thereafter, at an oral hearing accorded by the Commissioner before final rejection of the claim, the taxpayer presented an amendment in which it set forth that, in ascertaining its invested capital, real estate had been undervalued and certain intangibles had been improperly excluded from the computation. This court held that such an amendment, filed after the expiration of the period of limitations, could not be considered, first, because it totally changed the taxpayer's cause of action, if the analogies of pleading were to be regarded, and, second, because the original claim did not challenge the Commissioner's determination of invested capital, and an amendment which attacked this determination, fundamental to the taxpayer's contention, was in effect a new claim based upon a complete reversal of the taxpayer's former position.

In all these cases the court found the analogies of pleading helpful in deciding whether the claim was in such form as to be subject to the proffered amendment at a time when a claim wholly new would have been barred; but the opinions point out that the

analogy to pleading at law is not to be so slavishly followed as to ignore the necessities and realities of administrative procedure. Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge, or which, in the course of his investigation, he would naturally have ascertained, is permissible. On the other hand, a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim.

With these settled principles in mind we turn to the circumstances disclosed in the present case. The claim here was not general but specific. It did not assert generally that income, gross or net, had been overappraised or, generally, that the taxpayer was entitled to deductions not taken or granted. On the contrary, it pointed to two specific items of deduction which had not been taken and to which the taxpayer claimed to be entitled. It stated that during the taxable year the taxpayer's holdings of stock in two named corporations had become worthless, entailing a deductible loss of $995. While the claim added the phrase that the taxpayer claimed the sum named, or any greater sum which might be ascertained to be due, this did not call upon the Commissioner to make a complete reaudit of the taxpayer's return. The fact that he might have done so is immaterial. He could have acted on the claim, as apparently he did, by investigating the affairs of the two corporations. It was ascertained that litigation was in process upon the outcome of which would depend a decision as to the alleged worthlessness of some of the shares in question. He, therefore, naturally postponed action on the claim until the termination of that litigation. While matters were in this posture, and after the period of limitation had expired, the respondent presented a so-called amendment of her claim having no relation whatever to the items set forth in the original claim but dealing with a wholly distinct item of $36,750 reported as dividends received and asking that it be eliminated from that category and that the transaction be reclassified as capital gain

upon a basis which would result in a reduction of tax by some $6,000. This is not a case where the Commissioner waived the regulation with respect to the particularity with which the grounds of the claim must be set forth. There was no need for him to do so. The claim was not general like that in the *Memphis Cotton Oil* case and the others following in its train. It was as specific as it could be made and pointed unerringly to the items the Commissioner must consider. It called for no general audit of the taxpayer's affairs and apparently none was made. An investigation of the items designated could not have the least relation to that attempted to be opened in the untimely amendment. The respondent urges that these considerations are of no legal significance, since the claim not only called for redress of a specified grievance but demanded general relief as well. She insists we have likened a claim for refund to an action for money had and received and have required the Commissioner to accept and act upon a bill of particulars furnished him before actual rejection of the claim although the period of limitation has expired. But, as we said in *United States v. Henry Prentiss & Co., Inc., supra,* p. 84, "This does not mean that a pleader who abandons the common count and states the particular facts out of which his grievance has arisen retains unfettered freedom to change the statement at his pleasure."

Were it not for the presence in the original claim of the demand for refund of any other or greater sum which might be found due the taxpayer, we think it could not even be suggested that the claim was a general one for money had and received. Save for that clause the demand was of a specific amount based upon a specific transaction. Whether adjudication in strict analogy to the rules of pleading would permit the amendment we need not determine for the necessities and realities of administrative procedure preclude any such result. *United States* v. *Henry Prentiss & Co., Inc., supra,* p. 85. The very specification of the items of complaint would tend to confine the investigation to those items and there is no evidence that the examination was more extended.

Nor can the respondent gain advantage from the Commissioner's ruling communicated to his agent at Cleveland. There is no finding that, prior to the attempted amendment, the Commissioner knew the respondent was a stockholder of the Hanna Company or, if he did, that his attention was called to the fact that the reported receipt of dividends had reference to what the taxpayer received in respect of preferred stock of that company.

These views accord with the decisions of two circuit courts of appeal.[4] The respondent relies upon two decisions of the Court of Claims: *Youngstown Sheet & Tube Co.* v. *United States,* 7 F. Supp. 290, and *Con. P. Curran Printing Co.* v. *United States,* 15 F. Supp. 153. In the first a claim for additional depreciation depletion and amortization of an investment in mining properties was timely made. As a result of this claim a general audit of the taxpayer's affairs was had and resulted in the determination of a deficiency much greater than the amount of refund claimed. Upon appeal to the Board of Tax Appeals the deficiency was set aside and the Board found an overassessment due to failure to allow the claimed deduction and also deductions for depreciation of other assets. The Commissioner agreed that the overpayment found by the Board was correct. Thereupon the taxpayer filed, out of time, an amendment to claim additional specific deductions in accordance with the findings of the Board. The Commissioner allowed a refund of the item originally claimed but refused a refund of the others on the ground that the amendment sought to introduce new and distinct matters. In an action for recovery of the overpayment found by the Board, and claimed in the original and amended claims, the Court of Claims gave judgment for the taxpayer. We express no opinion as to whether the result may be sustained by the fact that while the original claim was pending the Commissioner was fully apprised of the items of deduction ultimately claimed in the amendment by two complete audits of the taxpayer's affairs and accounts. A similar situation is disclosed in the second case. The decisions were, however, put by the Court of Claims upon the same ground as in the instant case,—that a claim limited to a specified item might be amended out of time to seek a refund on account of other and unrelated items,—a view we hold untenable.

The judgment is reversed.

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[4] Bryant Paper Co. *v.* Holden, 63 F. (2d) 370, 65 F. (2d) 1012; Swedish Iron & Steel Corp. *v.* Edwards, 1 F. Supp. 335, affirmed 69 F. (2d) 1018; United States *v.* Richards, 79 F. (2d) 797; New York Trust Co. *v.* United States, 87 F. (2d) 889.